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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSETTE CLAIR BAUER, Nee GEISSER,

Petitioner,

v.

UNITED STATES OF AMERICA and
HECTOR GRABER, CONSUL GENERAL OF
THE GOVERNMENT OF SWITZERLAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LYNN PICKARD
Post Office Box 2423
Santa Fe, New Mexico 87501
(505) 988-4469

WILLIAM C. MARCHIONDO
Post Office Box 568
Albuquerque, New Mexico 87103
(505) 247-0751

CHARLES LOUIS ROBERTS
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

Attorneys for Petitioner.

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Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED

1. Whether individual rights granted by the Constitution prevail over obligations imposed by treaties with foreign nations.

2. Whether the Executive has the power to decline to extradite under the treaty on extradition between the United States and Switzerland.

3. Whether that power should have been utilized in this case under a plea bargain agreement requiring the United States to do everything possible to avoid petitioner's extradition.

4. Whether the finding of that district court that the United States had not used it best efforts to avoid extradition, as it was bound to do under the plea bargain, was clearly erroneous.

PARTIES

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

The opinion of the Court of Appeals from which Ms. Bauer now petitions for certiorari, which appears in the appendix hereto, pp. 1a-24a, is reported at 627 F.2d 745 (5th Cir. 1980).[1] The two prior opinions of the Court of Appeals in this case, which appear in the appendix at pp.

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[1] This opinion will be subsequently referred to as *Geisser III*.

63a-86a and 32a-55a, are reported at 554 F.2d 968 (5th Cir. 1977)[2] and 513 F.2d 862 (5th Cir. 1975).[3]

The district court's oral ruling and its findings of fact and order, from which the first appeal was taken, and which appear in the appendix at pp. 25a-27a and 28a-31a, are unreported. The district court's opinion following the first remand and from which the second appeal was taken, which appears in the appendix hereto, pp. 56a-62a, is reported at 414 F. Supp. 49 (S.D. Fla. 1976). The district court's order from which the third appeal was taken, which appears in the appendix at pp. 87a-88a, is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 10, 1980. A timely petition for rehearing was denied on November 6, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

Insofar as relevant to this case, the text of the Fifth and Sixth Amendments to the United States Constitution; the Treaty on Extradition with the Swiss Confederation, May 14, 1900, 31 Stat. 1928, T.S. No. 354; 18 U.S.C. §§3184, 3186; and Rule of Civil Procedure 52(a) are reproduced in the appendix hereto, pp. 93a-104a.

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[2]This opinion will be subsequently referred to as *Geisser II.*

[3]This opinion will be subsequently referred to as *Geisser I.*

STATEMENT OF THE CASE

This case concerns the efforts of the petitioner [Ms. Bauer] to compel the United States to honor a plea bargain agreement made with her. The three opinions rendered by the Court of Appeals in this case contain the facts material to the questions presented. In the first such opinion, Chief Judge Brown introduced the case as follows:

> This is an extraordinary case calling for extraordinary action. It is a case of the great United States going back on its word in a plea bargain . . . which assured the Government vital indispensible evidence leading to conviction of principals in a grand scale international heroin importing conspiracy. The effect of part of the bargain was that the defendant-turned-states-evidence would not be deported[4] to Switzerland. . . .

Geisser I, Appendix at p. 32a.

With about two and a half years left to serve on a sentence for aiding in a murder, Ms. Bauer escaped from a Swiss prison in 1964. She was apprehended in Miami in 1967 attempting to bring heroin into this country. Because the United States suspected that she was a member of a large narcotics organization, the United States reached a plea bargain agreement with her.

The substance of that agreement was that Ms. Bauer was to waive her constitutional rights and plead guilty to a new indictment. She was to serve a certain sentence. She was to provide intelligence information concerning

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[4]In the early stages of this litigation, the words deportation and extradition were oftentimes confused. In fact, the case concerns only extradition.

the international narcotics trade and was to testify, if necessary, against the members thereof, including her original attorneys. In return the United States was to insure her early release from prison and at least use its best efforts to assure that she was not returned to Switzerland. *Geisser I*, n. 4, quoting from Brief for the Appellant, United States Government, Appendix at pp. 35a-36a.

Ms. Bauer did plead guilty to the reduced charges; the sentence aspect of this case has been rendered moot because, having served the sentence, she is no longer in confinement pursuant to a sentence. The only remaining issue is that concerning extradition. It should be noted that after being free on bond for many years pending this litigation, Ms. Bauer voluntarily surrendered herself to the United States Marshall upon learning that a warrant had been issued for her arrest pursuant to the Court of Appeals' directive. She is presently in confinement for this reason.

It is agreed that Ms. Bauer upheld her end of the plea bargain to the greatest possible extent in revealing information and serving as a witness. In the words of the United States Attorney handling the case:

> There is no doubt that Bauer and Lambert cooperated beyond 100%. They were completely debriefed by U.S. Customs and other officials of the United States Government. Their cooperation led to numerous arrests, indictments and convictions of major narcotics figures in France and the United States. They testified in two major cases and I have been repeatedly told by U.S. Customs officers of the "fabulous" information given by Lambert and Bauer. It was my understanding from customs agents and narcotics agents who have better knowl-

> edge of this, that the information supplied by Lambert and Bauer was the beginning of the major breakthrough of the French, Corsican and European narcotic organizations.
>
> *Geisser I,* Appendix at p. 39a.

She had an outstanding memory for names, dates, places and other facts and was one of the most impressive witnesses the district judge had ever seen in a lawsuit. *Geisser I,* Appendix at pp. 41a-42a.

When it appeared that the United States was not going to live up to its part of the plea bargain, Ms. Bauer brought a proceeding for habeas corpus and other relief under 28 U.S.C. §§2241 and 2255 alleging a denial of constitutional rights particularly under the Fifth Amendment to the United States Constitution in that the plea bargain was breached. The district court's jurisdiction was thus predicated on the foregoing statutes and on general federal question jurisdiction. 28 U.S.C. §1331. This suit was filed six years after the date of the plea bargain. During these six years the United States had done nothing to fulfill its part of the plea bargain. *Geisser I,* Appendix at p. 45a.

The district court heard testimony and received documents concerning the plea bargain. Examples of such testimony are reproduced in the appendix hereto at pp. 107a-113a. On the one hand, Ms. Bauer testified that the Government promised that she would not be deported back to Switzerland. She was assured that the Government protects its witnesses and there was accordingly no doubt in her mind but that she would not be returned to Switzerland. Appendix, pp. 109a-111a. On the other hand, one witness testified that no promise relating to extradition was ever made to Ms. Bauer. Appendix, p. 113a. Still other witnesses or documents prepared by

these witnesses indicated that there was no absolute promise. Rather the promise was one to use best efforts or to do everything possible to avoid Ms. Bauer's extradition to Switzerland. Appendix, pp. 107a-108a, 111a-112a. Nonetheless, these other witnesses communicated to Ms. Bauer their belief that the Government would, in fact, see to it that she was not returned to Switzerland. Appendix, pp. 108a-109a, 112a-113a.

The district judge's oral remarks at the conclusion of the hearing used the words "best efforts." But he also said that he found that Ms. Bauer was of the opinion that there was a definite agreement and there was no question in his mind but that the definite agreement was "precisely what the Government was promising and what they were agreeing to." Appendix, pp. 25a-26a. The district court's formal findings reflect that a definite agreement was made. Appendix, p. 29a. It therefore vacated the order of extradition that Switzerland had obtained pursuants to its treaty with the United States, Treaty on Extradition with the Swiss Confederation, May 15, 1900, 31 Stat. 1928, T.S. No. 354. A copy of this order of extradition is found in the appendix hereto at pp. 105a-106a.

The United States appealed, raising a number of procedural grounds. The Court of Appeals was extremely concerned that the United States had breached the plea bargain. It noted that even assuming the bargain to be a best efforts one only, there was an outright failure to comply. It remanded the case for an authoritative declaration of the position of the United States regarding its efforts to fulfill its part of the plea bargain. Further, if those efforts were not successful in avoiding Ms. Bauer's extradition, the district court was to hold further hearings. *Geisser I,* Appendix, pp. 32a-55a.

After the remand, the Government began communicating with the Swiss Government about the Bauer matter. These communications consisted of one meeting and two exchanges of diplomatic notes. These communications explained the predicament of the United States as having conflicting obligations to Ms. Bauer under her plea bargain and to Switzerland under the treaty. The Swiss Government was urged to withdraw its extradition request. Switzerland refused.

Following this, Switzerland was allowed to intervene in the proceedings and a hearing was held in the district court. The United States and Switzerland took the position that the meeting and two exchanges of notes constituted "best efforts" to avoid extradition and, therefore, the extradition should proceed. No evidence, apart from documents detailing the efforts and affidavits concerning the safety record of Swiss prisons, was introduced. The district court reiterated its finding that an absolute promise had been made and noted that the Court of Appeals apparently agreed with that finding. Appendix, 56a-57a. Even evaluating the actions of the United States from a best efforts standpoint, the district court concluded that best efforts were not made. The extradition order was again vacated.

The United States and Switzerland appealed. On this second appeal, the Court of Appeals in effect overturned the district court's finding of an absolute promise and concluded that the agreement made by the United States was one to use best efforts. *Geisser II*, Appendix, pp. 73a-74a. The Court of Appeals, however, concluded that the district court was not clearly in error in ruling that the United States still had not used best efforts. Of importance to the Court's ruling was that the United States did not emphasize to the Swiss Government the

reasons underlying the original bargain, Ms. Bauer's admirable performance in keeping her part of it, her intense fears of reprisals and the conclusion of Government agents that her fears were well founded. The whole basis for the extradition aspect of the plea bargain was that Ms. Bauer feared that she would be killed by members of the conspiracy against whom she informed if she were returned to Switzerland. This fear was recognized as "fully warranted" by agents of the United States. *Geisser III*, n. 4, Appendix p. 13a. The case was remanded for the United States to use its best efforts to prevent Ms. Bauer's extradition.

After this remand, the United States began a series of communications with the Swiss Government, this time consisting of an informal conference followed by a diplomatic note and one exchange of notes. In one such note, the Secretary of State described the Government's prior efforts to avoid Ms. Bauer's extradition as follows:

> The United States Government has already gone to the United States District Court twice and to the United States Court of Appeals twice in support of the efforts of the Government of Switzerland to extradite Mrs. Bauer.

Geisser III n. 5, Appendix at p. 15a.

The notes and attachments thereto did outline the four matters to which reference was made in the Court of Appeals opinion concerning the reasons for the plea bargain and its performance. The Swiss Government continued to maintain its extradition request and both Switzerland and the United States moved to dismiss Ms. Bauer's habeas corpus petition and revoke her bond. Attached to the motion of the United States were the texts of the communications. A year passed during which time Ms. Bauer attempted to engage in discovery. These

attempts were opposed by the United States. Then another meeting was held between representatives of the Swiss and American Governments at which the Bauer case was summarized. Switzerland again refused to withdraw its extradition request. Finally, Ms. Bauer moved for her discharge. Without holding a hearing, the district court again found that the United States had failed to use best efforts on her behalf and ordered her released from any order relating to extradition. The United States and Switzerland again appealed.

Prior to the Court of Appeals' third opinion in this case, the courts had consistently recognized the tension between Ms. Bauer's constitutional right to have her plea bargain enforced under *Santobello v. New York*, 404 U.S. 257 (1971), and the United States' obligation to extradite her under its treaty with Switzerland. This tension had previously been resolved in favor of Ms. Bauer pursuant to the doctrine that individual constitutional rights take precedence over Government treaty obligations under *Reid v. Covert*, 354 U.S. 1 (1957).

On the third appeal, the Court of Appeals ruled that the district court's finding that the United States had not used best efforts to avoid extradition was clearly erroneous. It reasoned that further efforts would turn into a violation of treaty obligations and that the nature of the promise found cannot be taken to require such a violation. The Court noted that in view of the Swiss Government's representation of the United States in negotiations with Iran to free the hostages, Ms. Bauer's case could not take precedence over friendly and cooperative international relations such as would be marred if the treaty were breached. *Geisser III*, Appendix, pp. 21a-23a. Judgment was accordingly entered for the United States and Switzerland.

REASONS FOR GRANTING THE WRIT

I.

IF THE DOCTRINE STATED IN *REID v. COVERT*, 354 U.S. 1 (1957), THAT INDIVIDUAL CONSTITUTIONAL RIGHTS TAKE PRECEDENCE OVER GOVERNMENT TREATY OBLIGATIONS IS NOT YET SETTLED, IT SHOULD BE SETTLED BY THIS COURT. IF IT IS SETTLED, THE COURT OF APPEALS DECISION, WHICH TREATED MS. BAUER'S RIGHTS AS INFERIOR TO THE GOVERNMENT OBLIGATION, IS IN CONFLICT WITH IT.

This case presents a square conflict between the obligations of our country to Switzerland on the one hand and to Ms. Bauer on the other. Pursuant to its treaty on extradition with Switzerland, the United States has an obligation to extradite Ms. Bauer.

The United States is also obligated to Ms. Bauer. Ms. Bauer's rights in this case flow from constitutional doctrine expounded in *Santobello v. New York*, 404 U.S. 257 (1971). A person who is promised something in a plea bargain has the constitutional right to have the bargain enforced. Ms. Bauer made a plea bargain with the United States. In pursuance of it she waived a panoply of constitutional rights and gave enormous help to the United States' efforts at law enforcement. She did this at the risk that she would be killed by those against whom she informed if she were returned to Switzerland. This risk and her consequent fear is recognized as fully justified by United States officials, as it would be to anyone familiar with the sordid business of narcotics trafficking. To allay her fears, the United States promised, at least, to use its best efforts to avoid her return to Switzerland.

In assessing whether the United States complied with the plea bargain, a certain standard was used which took certain considerations as given. Thus, the Court below repeatedly stated that the treaty could not be violated—compliance with the plea bargain could not require so much. The Court viewed a possible violation of the treaty as necessarily leading to unfriendly relations with the Swiss, who are doing so much for us in connection with the Iran matter. Again, compliance with the plea bargain could not require the creation of delicate problems of international relations in world diplomacy. Appendix, pp. 21a-23a.

The standard used by the Court of Appeals, in effect, gave precedence to the obligation not to violate the treaty over the obligation not to violate Ms. Bauer's constitutional rights. This was contrary to *Reid v. Covert*, 354 U.S. 1, 17 (1957), where Mr. Justice Black, writing for a plurality of the Court, stated:

> There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.[5]

If Ms. Bauer's constitutional rights are superior to the treaty, any assessment of whether those rights were violated should be made without reference to a standard which implicitly holds that the treaty is superior.

Moreover, no small part of the rationale of the Court of Appeals was based on the idea that this case had to be

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[5]The Government of Switzerland argued below that this plurality opinion was not binding as an opinion of this Court. If there is any question, but that this statement, based on numerous cases, does not accurately reflect the law, this Court should grant certiorari to settle this important matter.

decided with extreme deference to international diplomacy. Indeed, so much deference was used that the Court of Appeals stated that "best efforts cannot be interpreted as 'strongest possible efforts,' " Appendix p. 21a, when the actual words of the promise according to the promisor were, "I did state . . . on every occasion . . . that we would do everything possible. . . ." Appendix, p. 107a.

The Court of Appeals' perversion of the best efforts promise into one which would be satisfied no matter what the character of the efforts should again call to mind the words of Mr. Justice Black:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.
>
> *Reid v. Covert*, 354 U.S. 1, 14 (1957).

See also Torres v. Puerto Rico, 442 U.S. 465, 476 (1979) (Brennan, J., concurring).

The Court of Appeals decision was based on political expediency and on whatever inconvenience might be caused by a possible violation of the treaty. For the sake of unproven Swiss aid in connection with the now ended crisis in Iran, the Court sacrificed Ms. Bauer's rights under the Constitution. Appendix, pp. 21a-23a. The danger of such reasoning to our system of constitutional government which cherishes individual rights is apparent.

The United States used Ms. Bauer for its own purposes and reaped great benefit from such use. Under the Constitution, it should not now be allowed to turn its back on her.

This Court should grant certiorari to resolve this important question of individual constitutional rights in the context of international relations. This Court has shown a willingness in the past to examine cases such as this one which involve the relation of an international treaty to an individual's constitutional rights. *Reid v. Covert*, 354 U.S. 1 (1957). This case involves questions of first impressions before this Court: whether the enforcement of a plea bargain will prevail over an extradition treaty and to what extent it will prevail. Because of the importance of the answers to these questions as well as the importance of the subject area generally, a grant of a writ of certiorari is warranted.

II.

THE EXECUTIVE BRANCH HAS THE POWER TO DELAY OR DENY EXTRADITION UNDER THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND THE CONFEDERATION OF SWITZERLAND.

III.

UNDER A PLEA BARGAIN AGREEMENT WHICH BOUND THE EXECUTIVE BRANCH TO "DO EVERYTHING POSSIBLE" TO AVOID EXTRADITION, THE EXECUTIVE BRANCH IS OBLIGATED TO PREVENT EXTRADITION.

A. The Agreement.

In the words of the United States Attorney who actually struck the agreement with Ms. Bauer, the actual promise was that the United States "would do everything possible" to see that she was not deported or extradited to Switzerland. *Geisser I*, Appendix at pp. 38a-39a. Plea bargain agreements such as the above are either "specifically enforceable between the parties to the agreement or

the plea is void." *Gallegos v. United States*, 466 F.2d 740, 741 (5th Cir. 1972). As for withdrawing Ms. Bauer's plea, Judge Brown commented:

> [T]he avenues of redress available for Bauer are few. Eradicating the impact of her testimony is impossible. And, of course, an opportunity to replead seems superficial and unrealistic in view of her long confinement. Specific performance may well be the only way out to keep the bargain.
>
> *Geisser I*, Appendix at p. 50a.

In making this comment, *see also Geisser II*, Appendix at p. 81a, the Fifth Circuit acknowledged that Ms. Bauer was inalterably locked into the consequences of her agreement if not the agreement itself. Her crucial testimony which has caused her and various Government agents to fear for her life cannot be withdrawn. Therefore, the question remains as to whether the Government has the power to enforce the promise which was made to Ms. Bauer.

B. Power of the Executive to Delay or Deny Extradition.

The United States Court of Appeals recognized that this issue was present in this case and commented that the Secretary of State apparently had "discretion in declining extradition." *Geisser I*, n. 22, Appendix at p. 52a.[6] This discretionary power of the Executive is grounded in the actual language of the extradition statutes, which state that, "The Secretary of State *may* order the person . . . to be delivered to any authorized agent of

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[6]Citing 4 Hackworth, *Digest of International Law* §338 (1942); 4 Moore, *International Law Digest* §616 (1906); Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313 (1962); *Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965).

such foreign government. . . ." 18 U.S.C. §3186, Appendix at p. 103a. (Emphasis added.) The Second Circuit accordingly noted that: "The Executive Branch . . . is empowered to make the final decision on extradition and has assumed the discretion to deny or delay extradition on humanitarian grounds." *Sindona v. Grant*, 619 F.2d 167, 176 (2d Cir. 1980).

C. The Obligation of the Executive to Delay or Prevent Extradition in This Case.

It is the petitioner's position that the Government has discretion to prevent her extradition. Actually, the Government has the obligation to place Ms. Bauer's constitutional rights over an offending portion of an international treaty whether discretionary or not. *Reid v. Covert*, 354 U.S. 1 (1957). The *Reid* treaty did not appear to be discretionary; nor did it involve a matter of lesser national and international importance than the extradition treaty involved here. The *Reid* case involved a Status of Forces Agreement which the Government argued was vital to national defense. *Reid, supra,* 354 U.S. at 15. Yet, the practical decision of this Court was to prohibit the Government from complying with the terms of that treaty. *Reid, supra,* 354 U.S. at 14-15. Thus, under the constitutional mandate of *Santobello v. New York*, 404 U.S. 257 (1971), whereby the Government's bargain with the defendant "must be fulfilled," *id.* at 262, the Executive Branch is obligated to utilize its discretion to avoid her extradition, *Sindona, supra;* or, if no discretion exists, simply to decline to comply with such treaty in this case. *Reid, supra.*

The question of the power to deny extradition is one of first impression in the Court. Because the existence of tension between constitutional rights and treaty obligations has called for the exercise of this Court's discretion

in the past, *Reid v. Covert*, 354 U.S. 1 (1957), and cases therein, this Court should grant certiorari in this case to address this issue in the specific context of extradition.

IV.

THE COURT OF APPEALS' FINDING THAT THE UNITED STATES HAD USED ITS "BEST EFFORT" TO AVOID MS. BAUER'S EXTRADITION TO SWITZERLAND, WHEN THE DISTRICT COURT HAD FOUND TO THE CONTRARY, CONSTITUTED SUCH AN EXTREME DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The proper and accepted course of judicial proceedings mandates that an appellate court is not to act as a factfinder. Rather the task of ascertaining where the truth lies is reserved for the district court.

Rule of Civil Procedure 52(a) provides that the district court shall find the facts and that such findings of fact are not to be set aside unless clearly erroneous. A finding is clearly erroneous not simply because the appellate court would have found otherwise, but only if on the entire evidence the appellate court is left with the definite and firm conviction that a mistake has been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). A mistake is said to be made when the trial court's findings are induced by an erroneous view of the law or when they lack substantial evidentiary support. *Whitson v. Yaffe Iron & Metal Corp.*, 385 F.2d 168 (8th Cir. 1967). On the other hand when the evidence, though conflicting, supports the findings, they are binding on appeal and may not be overturned. *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978).

What constitutes best efforts by a party will vary depending on the factual context. *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 266 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979); *Perma Research & Development Co. v. Singer Co.*, 308 F. Supp. 743, 748 (S.D.N.Y. 1970). Here, the factual context was such that the district court originally found that the United States had made an absolute promise that Ms. Bauer would not be extradited to Switzerland. Appendix at pp. 29a, 57a. The evidence before the district court supported this interpretation. Appendix at pp. 107a-113a. In addition, the ordinary meaning of the word best, i.e. "excelling or surpassing all others of its kind," Webster's Third New International Dictionary, p. 208 (1961), connotes that the efforts by the United States should not be minimal.

The district court found, in 1979, that the United States still had not used best efforts to avoid Ms. Bauer's extradition to Switzerland. The facts in the record which support the district court's finding are that the plea bargain was consummated in 1967. In the intervening 12 years, the United States had spent less than 11 months, at a rate of approximately one communication in each of those months, in a half-hearted effort to persuade the Swiss Government to withdraw its extradition request. Throughout its communications, the United States placed primary reliance on the fact that the courts were forcing it into a position which it felt was legally erroneous. As noted by the Secretary of State, the position of the United States had been consistently in support of the Swiss efforts to extradite. It is inconceivable that a party using best efforts to avoid extradition would spend seven years in court trying to effectuate extradition.

It is clear that had Ms. Bauer stood in the shoes of the United States, and had she engaged in the same tactics as

did the United States, no court would hold that she had used best efforts to comply with her part of the plea bargain. If after her 1967 plea bargain, Ms. Bauer had (1) avoided testifying except after years of litigation devoted to avoiding this obligation; (2) acted in complicity with an adverse party to prevent such testimony; and (3) acted in such a manner as to completely undercut and undermine the value of such testimony when it was finally given, it could not be said that she used "best efforts" to fulfill her bargain. Surely, the Government cannot beheld to any lesser standard than a criminal defendant in meeting its promises.

Moreover, one could well question what sort of persuasive powers the United States could have in its so-called efforts to avoid extradition when immediately before and immediately after those efforts, it took the position that extradition should proceed. This "schizophrenic position" of the United States was noted by the Court of Appeals. *Geisser I*, Appendix at p. 45a. Not once in the entire history of this case did the United States ever express a sincere and unqualified belief that Ms. Bauer should not be extradited. The power of persuasion must include a measure of sincerity to be effective so as to be called best efforts. Yet in all its communications with Switzerland, it was clear that the United States was pleading Ms. Bauer's case not because she had given invaluable information about drug smuggling, not because she helped the United States incarcerate a major drug dealer at the risk of her own life, not because she fulfilled her part of a solemn bargain with the United States, but rather the United States was pleading her case because the courts were making the United States do so. If Switzerland was unpersuaded, it is no wonder. The

United States' efforts to avoid extradition were so ingenuine in light of the position in favor of extradition that it has taken throughout this case that they could hardly be called "best efforts."

In addition, it is noteworthy that the district court took no evidence on the question of best efforts apart from the documents (letters, diplomatic notes and the like) which allegedly constituted the best efforts. Yet implicit in the second remand of this case, Appendix, pp. 63a-86a, was that the United States bore the burden of exercising best efforts and proving such to the district court. The Court of Appeals overturned the district court finding because best efforts only required full pursuit of the case through diplomatic channels and the letters and notes showed that this was done. However, the salient feature of this case is that there is not a shred of evidentiary support for the proposition that the letters and notes constituted such full pursuit. In the absence of evidence, the result reached by the Court of Appeals can only be based on sheer speculation, and that provides no basis for finding a district court to be in clear error. *Vohs v. Dickson*, 495 F.2d 607, 624 (5th Cir. 1974).

From the evidence before it, the district court was entitled to find that the United States did not use best efforts. Any contrary finding by the Court of Appeals is a classic usurpation of the power of the fact-finder in the first instance to find the facts. Such a departure from the settled and accepted rules governing appellate review should not be countenanced by this Court.

It is appropriate for this Court to grant certiorari to question whether the Court of Appeals properly discharged its appellate function of reviewing findings of fact. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 108 (1969). This Court should do so in this

case because the Court of Appeals was so clearly wrong and because of the dire consequences to Ms. Bauer of that error.

CONCLUSION

For the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

LYNN PICKARD
Post Office Box 2423
Santa Fe, New Mexico 87501
(505) 988-4469

WILLIAM C. MARCHIONDO
Post Office Box 568
Albuquerque, New Mexico 87103
(505) 247-0751

CHARLES LOUIS ROBERTS
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

Attorneys for Petitioner.

February 4, 1981

80-1316

No.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSETTE CLAIR BAUER, Nee GEISSER,

Petitioner,

v.

UNITED STATES OF AMERICA and
HECTOR GRABER, CONSUL GENERAL OF
THE GOVERNMENT OF SWITZERLAND,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LYNN PICKARD
Post Office Box 2423
Santa Fe, New Mexico 87501
(505) 988-4469

WILLIAM C. MARCHIONDO
Post Office Box 568
Albuquerque, New Mexico 87103
(505) 247-0751

CHARLES LOUIS ROBERTS
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

Attorneys for Petitioner.

February 4, 1981

Washington, D.C. • THIEL PRESS • (202) 638-4621

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APPENDIX A

In the Matter of the Petition of Josette GEISSER, Divorced Bauer, a/k/a Paulette Louise Fallai.

Josette Clair BAUER, Nee Geisser, a/k/a Paulette Louise Fallai, Petitioner-Appellee,

v.

UNITED STATES of America, Respondent-Appellant,

Hector Graber, Consul General of the Government of Switzerland, Intervenor-Appellant.

No. 79-3869.

United States Court of Appeals, Fifth Circuit.

Oct. 10, 1980.

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This case comes to the Court for the third time. Josette Bauer nee Geisser is a Swiss citizen. On September 13, 1964, she escaped from prison in Switzerland. When she escaped, she had more than two and one-half years remaining of a sentence for aiding and abetting in the murder of her father for financial gain.

On August 31, 1967, she was arrested in Miami, Florida, with an accomplice, Willy Lambert. They were charged with attempting to smuggle twenty eight pounds of heroin into the country. She and her com-

panion were indicted by a grand jury for felonies which would normally lead to sentences of thirty to forty years in prison.

The Swiss government was immediately interested in the apprehension of Josette Bauer and instituted extradition proceedings under the 1900 extradition treaty between the governments of Switzerland and the United States. 31 Stat. 1928. An extradition hearing was held in the United States District Court for the Southern District of Florida. Bauer and her counsel participated. Judge Atkins issued an order dated November 2, 1967, certifying that Bauer was subject to extradition to Switzerland.

Shortly thereafter, the United States Attorney's Office in Florida concluded a plea bargain with Bauer and Lambert under which it was agreed that they would reveal all they knew about the conspiracy to smuggle heroin from France and Switzerland in which they were involved and that they would testify in the event there were trials of others involved in the conspiracy. In turn, the government promised that they would be reindicted for lesser offenses which would lead to sentences of no more than seven years, that they would be paroled after three years, and that the government would make its "best efforts" to avoid their "deportation" to France or Switzerland.[1]

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[1] The record reveals that this last aspect of the plea bargain was confused. At one point in this case the District Judge held that the plea bargain was an absolute promise that Bauer and Lambert would not be sent to France or Switzerland. But, as shown later in this opinion, it is now settled that the plea bargain obligated the government to make its "best efforts" to avoid the return of Bauer and Lambert to France or Switzerland.

[footnote continued]

In accordance with the plea bargain, lesser indictments were obtained, and Bauer and Lambert were sentenced to seven years.

It has been agreed throughout that Josette Bauer upheld her end of the plea bargain to the greatest possible extent in revealing information and serving as a witness. She was characterized as a witness with an outstanding memory for names, dates, places, and other facts. The United States Attorney said her testimony was a major factor in breaking up a large international conspiracy to smuggle heroin into the United States.[2]

On October 10, 1969, Bauer escaped from federal prison. She had served just over two years of her seven year sentence, short of the three year period at which she had been promised parole. There is remarkably little reference in subsequent opinions in the District Court concerning this escape. There is some indication that the Federal District Judge, Judge Mehrtens, accepted the explanation that she had escaped because of her fear of being extradited after three years because she had overwhelming fears for her life if she was returned to Switzerland.

It also should be pointed out that the plea bargain was inexact. It was stated in terms of "deportation" to France or Switzerland, *Geisser v. United States,* 513 F.2d 862, 864 n.4, 868 n.9 (5th Cir. 1975). The issue is not deportation at all; it is extradition. Extradition is subject to specific international obligations while deportation is essentially at the option of the deporting country.

[2]The details concerning the plea bargaining and the effectiveness of Josette Bauer's testimony are related in a letter to Bauer's counsel by William Earle, Special Attorney to the Department of Justice. This letter is reproduced in full in footnote 5 of Chief Judge Brown's opinion rendered the first time the case reached this court, 513 F.2d 862, 865 (1975).

Bauer was apprehended in Albuquerque, New Mexico, on June 25, 1972, where she was living apparently as a law abiding and respected citizen under the name of Jean Baker. She was operating a school in horsemanship for children.

Because of her escape, the Department of Justice disavowed the plea bargain. No attempt was made to obtain her parole at the end of three years, and she was sentenced to a consecutive eighteen months in prison for her escape.

When it appeared that the Department of Justice was no longer going to undertake to live up to the plea bargain, Bauer brought this proceeding for habeas corpus, for injunctive relief against extradition, and for such other relief as would force the government to carry out its promises in the plea bargain.

Judge Mehrtens, United States District Court for the Southern District of Florida, granted the petition for habeas corpus after a hearing on August 8, 1973. The order directed that Bauer be discharged from any detention and that the order of extradition be vacated. Further the order "forever restrained" the United States government from executing or attempting to execute the terms of the extradition order.

On appeal, this Court vacated and remanded. *Geisser v. United States,* 513 F.2d 862 (5th Cir. 1975). Chief Judge Brown, writing for the court, found that the federal government had an obligation to carry out the plea bargain made, and that it had not done so. The case was remanded for consideration by the involved governmental officials at the highest level in order for them to "state unequivocally the position of the United States government." 513 F.2d at 872. The Court went on to require that in the event the position taken by

the government did not result in the release of Bauer, the District Court was directed to conduct further hearings to determine just what the government had done with respect to the promise "to use our best efforts". . . .

Following this remand, the United States government undertook steps to exercise its "best efforts". Deputy Attorney General Harold Tyler wrote Secretary of State Kissinger reporting the facts, including the plea bargain. The letter made a brief formal request that the Secretary of State assist in "resolving this vexing problem". Approximately five months later Deputy Secretary of State Robert S. Ingersoll responded to the Department of Justice. He detailed exchanges of notes with the Swiss government in which the Swiss government maintained its request for extradition and insisted that not granting extradition would violate the obligation of the extradition treaty. The Ingersoll letter further detailed a meeting in the Department of State in which the Swiss government remained adamant. Another note was then sent to the Charge d'Affaires of the Swiss embassy urging the government to withdraw the extradition request. By a letter to the Secretary of State on March 15, 1976, the Swiss government still insisted on extradition.[3]

Upon rehearing in the District Court on May 21, 1976, Judge Mehrtens found that these actions by the government were "too little and too late" to discharge

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[3]The complete text of the exchange of letters between Deputy Attorney General Harold R. Tyler and Deputy Secretary of State Robert S. Ingersoll has been printed in footnotes 1 and 2 to the second appearance of the case in this Court. 554 F.2d 698, 700 (1977). The crucial letter from the Swiss government, dated March 15, 1976, is printed in full at footnote 7, *infra*.

its obligation contained in the plea bargain. The United States government and the Consul General of Switzerland who had been permitted to intervene again appealed. This Court again vacated and remanded. *Geisser v. United States,* 554 F.2d 698 (5th Cir. 1977). Judge Wisdom wrote the opinion for the majority of the panel. In evaluating the efforts detailed above, the majority found a fatal weakness in the failure of the Department of Justice to stress the particular emphasis upon Bauer's fears for her life if she were extradited to Switzerland. The Court gave the government "a reasonable time in which to use its 'best efforts' to prevent the extradition of Bauer to Switzerland or France". 554 F.2d at 706.

Judge Coleman dissented. He asserted that the solemn treaty obligation to extradite a Swiss citizen to Switzerland under these circumstances meant that it is impossible for any United States Attorney to make binding the kind of plea bargain which had been undertaken in this case. He would have entered an order directing immediate compliance with the treaty.

After this decision, the government again undertook to persuade the Swiss government to withdraw its extradition request. A thorough and detailed letter was written by Peter F. Flaherty, Deputy Attorney General, to Secretary of State Vance. The Secretary of State in a diplomatic communication to the Swiss ambassador requested that the government of Switzerland withdraw its extradition demand. This letter forwarded the Flaherty letter and adopted its contents. When the Swiss government again refused to withdraw its request for extradition, two informal meetings were held in the Department of State. The Swiss ambassador then communicated again with his government in an attempt to

get the government to withdraw. These final efforts failed. The texts of the communications involved in these latest efforts of the United States government appear later in this opinion where an evaluation is made of the attempts by the United States government to get the Swiss government to change its mind.

Following these written efforts, but before the last meetings in the State Department, District Judge Mehrtens, after hearing on October 2, 1979, again vacated the extradition order. He directed that Bauer be released from any form of detention and be authorized to continue to reside permanently in the United States. The Judge characterized the efforts briefly described above as "nominal" and "wholly inadequate to fulfill" the government's obligation under the plea bargain.

The government of the United States and the Consul General of Switzerland have now again appealed to this Court.

I. Retained Jurisdiction

A preliminary matter must be resolved. The Consul General of Switzerland in his appeal to this Court urged that the retention of jurisdiction by the Court at the conclusion of its 1977 majority opinion required that this appeal be heard by the same panel which heard the appeal at that time. The majority opinion in that case said, "While retaining jurisdiction we remand the case to the District Court. .", *Geisser v. United States,* 554 F.2d 698, 706 (5th Cir. 1977). Prior to orgal argument in the current appeal, this panel concluded this contention was without merit.

In the 1977 opinion quoted immediately above there was no specific reference to the panel which heard the case. The word "we" was a reference to the Court and

not a particular panel. There have been cases where a panel of this Court has retained jurisdiction as a panel. We conclude that such a retention of jurisdiction by a particular panel must be specific. The normal and usual retention of jurisdiction by a court is a retention of jurisdiction by the court in its regular and normal judicial processes and not a retention of jurisdiction by a particular judge or judges of that court.

The contention that this appeal had to be heard by the same panel which heard the 1977 appeal and retained jurisdiction for the Court is unfounded.

II. The Facts and Law Controlling the Case

Two prior decisions of this Court have established the facts and the law controlling this case except insofar as there have been additional efforts by the United States government to carry out the obligation of the plea bargain since the decision of 1977. It is now established that:

1. There was a plea bargain under which the United States government promised Bauer certain concessions in return for her testimony and other information relating to the conspiracy to smuggle heroin into the United States from France or Switzerland.

2. Josette Bauer completely and effectively carried out her oblications under the plea bargain.

3. Earlier issues concerning the time that Bauer served in federal prison are now moot.

4. As part of the plea bargain the government promised to exert its "best efforts" to try to avoid the extradition of Bauer to Switzerland or France. Earlier assertions by Bauer that the plea bargain was an absolute promise that there would be no extradition

have been resolved by the 1977 decision which draws a clear conclusion that the plea bargain was a "best efforts" promise only.

5. The opinions of this Court both in 1975 and 1977 decisions make clear that if the United States government has not expended its "best efforts" in accordance with the plea bargain Josette Bauer's constitutional rights have been violated.

Both opinions rely upon the case of *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The Supreme Court there held that a plea of guilty induced by a promise of the government in a plea bargain is a binding obligation contractual in nature on the government. If a court's decision is made in response to such a plea of guilty, and then the United States government does not carry out its promises in the plea bargain, the constitutional due process rights guaranteeing a fair trial are violated.

In *Santobello* the Court held that the constitutional rights of the accused would be infringed even if there was no showing of an adverse impact from the failure to carry out the promise. In *Santobello* the judge disavowed following the sentencing recommendation which was made in violation of the plea bargain. The Court held, nevertheless, that inducing the guilty plea, and then failing to carry out the promise obtained in the plea bargain, did result in an infringement of the constitutional rights of the accused who had plead guilty. Bauer's jeopardy from serious consequences is obvious if the government does not carry out the promise made in the plea bargain.

Much of the argument made on behalf of Bauer in this case, and a number of the questions asked by the District Court as this case followed its labyrinthine

course failed to define clearly the nature of the constitutional right which Josette Bauer claims. Upon analysis, it is quite clear that Josette Bauer can claim a constitutional infringement of her right to a fair trial only if it is determined that the United States government has violated the plea bargain.

If the United States government has not complied with the plea bargain, her constitutional claim is a valid one and a purported treaty obligation of the United States government cannot override an individual constitutional right. Judge Brown so indicated in his opinion in the 1975 case. *Geisser v. United States*, 513 F.2d 862, 869 fn.11 (5th Cir. 1975) (citing *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957)). But if the United States government has complied with the plea bargain then Bauer has no constitutional claim.

Succinctly, this means that Bauer's claim of constitutional right has no independent strength beyond the resolution of the single question of whether the government has carried out its promise under the plea bargain which was made.

III. Has the Government Now Exerted its "Best Efforts"?

Before the 1975 decision in this Court, the government had exerted no efforts of any consequence to carry out its plea bargain obligation concerning extradition. It took the position that Josette Bauer's escape from prison in 1969 and her almost three years as a fugitive justified a disavowal of the government's obligation. The 1975 decision confirmed a holding to the contrary. Chief Judge Brown, recognizing the "best efforts" promise, stated: "The best effort would, at a minimum, be a strong presentation to the Department

of State as to what had been promised and the likely dangers to the bargainee-defendant-witness." *Geisser v. United States*, 513 F.2d at 869.

The 1977 decision of this Court found that the government had not complied with the mandate of the 1975 decision, particularly with respect to "the likely dangers" to Bauer. The 1977 decision found the efforts which had been made by the government consisted realistically only of a formal request that Josette Bauer not be extradited. There was no significant mention of the extremely important role which she had played in breaking up this international heroin smuggling conspiracy. Even more to the point, where was no specific mention of the great fears for her life and safety which she harbored if she were extradited, and the conclusion of Department of Justice personnel that her fears were well-founded.

The Court in the 1977 opinion laid down four specific matters which had to be strongly advanced by the government to achieve "best efforts". These required governmental assertions were:

> (1) The reasons underlying the original bargain, (2) Bauer's admirable performance in keeping her part of the agreement, (3) her "intense fear of reprisals", and (4) the conclusion of Government agents on the case that her fears were well-founded.

Petition of Geisser, 554 F.2d 698, 703 (5th Cir. 1977) (enumeration added).

The Court in its opinion then went on to say: "Her intense fear for her life was the predicate for the bargain, and the Government's failure to explain fully and strongly this part of the agreement reduced its advocacy of her cause almost to an empty gesture." *Id.*

at 704. The Court concluded, "The Government must again try to prevent Bauer's extradition to Switzerland or France. We are not convinced that the vast powers of persuasion at the command of the Departments of Justice and State have been adequately applied to Bauer's cause." *Id.* at 706.

The United States Government began to act immediately after the 1977 decision was handed down on June 22. In late June or early July, the Assistant Legal Advisor for Management of the Department of State and also the Swiss Desk Officer held an informal conference on the case with the First Secretary to the Swiss embassy. As a result of this conference, the Swiss authorities replied in a diplomatic note of July 22, 1977, that they wished to "uphold their request for extradition of the aforementioned Swiss citizen, first issued in the embassy's note of September 22, 1967, based on the treaty of extradition of May 14, 1900, . . ." Next, on September 2, 1977 Deputy Attorney General Peter F. Flaherty wrote a five page letter to Secretary of State Vance detailing the Bauer case. Printed in the note are the critical statements in that letter which undertook to meet the requirements laid down by the Court of Appeals in its 1977 decision. They begin on page 3 and run to the end of the letter.[4]

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[4]In reliance upon our agreement with her, Bauer cooperated fully with our Government. She gave crucial testimony which resulted in the conviction in this country of a major narcotics trafficker. The District Judge who presided at that trial described her as one of the most impressive witnesses he had ever encountered. In addition, she provided intelligence information that our representatives regarded as invaluable. Her almost "total recall", to employ the description used by the Customs agent who repeatedly dealt with her, led to at least ten arrests abroad

[footnote continued]

It will be observed that the four requirements stated by this Court in its 1977 opinion were covered in detail in that portion of the letter quoted in the footnote.

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and otherwise contributed significantly to efforts to frustrate the international narcotics trade. This country and others have benefited from Ms. Bauer's full cooperation. To a significant—probably decisive—degree, that cooperation was secured by our assurance that every effort would be made to prevent her extradition. She is accordingly entitled to every consideration. In view of her important contribution to worthy law enforcement goals and our promise to her, she is certainly entitled to have us pursue any proper avenue which might persuade the Confederation of Switzerland to withdraw its request for her extradition.

The Court of Appeals stated that Ms. Bauer's "intense fear for her life was the predicate for the bargain." We have no reason to quarrel with that conclusion. Indeed, it accurately reflects the impression of our representatives who dealt with her at the time. Ms. Bauer feared that if she were returned to Switzerland after having provided information on international narcotics smuggling, she would be killed. Her fear seemed fully warranted to our officials at the time, as it would to anyone familiar with the sordid business of narcotics trafficking.

Part of the bargain permitted her to enter a plea of guilty to reduced charges. It later—and somewhat unexpectedly—became necessary for her to testify against a major narcotics smuggler, the "traffic manager" who had supervised Bauer. Because her cooperation would thus become public, she initially balked. According to the agent who dealt with her throughout this period, "Bauer would break down and actually tremble for fear of what might happen" as a result of her testimony against her former boss in the narcotics smuggling conspiracy. In order to console her and to secure her continued cooperation, Bauer was told that we would almost certainly be able to prevent her extradition to Switzerland. According to the same agent, Bauer's fear existed "because of some very prominent people, including a former attorney in Switzerland, who had facilitated (her) escape (in Switzerland and) had in fact negotiated with some of his associates to facilitate her escape from prison and ability to flee the country." Subsequently the same agent contacted Bauer while she was incarcerated and advised her that Swiss authorities wished to interview her. According to the agent, Bauer became

[footnote continued]

Secretary of State Vance then by diplomatic letter dated October 26, 1977, again asked the Swiss govern-

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"quite upset" and indeed "almost panicked" because "some of the people that she had provided information on, were people of important positions, who allegedly were outstanding citizens, who were in high places, not necessarily government places, but well established in the business world."

While Bauer's intense fear of reprisal is established by her own testimony, that of her lawyer, and the representations of two Department of Justice attorneys as well, it is the Customs agent who was most frequently in contact with her and thus in the best position to assess the matter. We are accordingly enclosing with this letter a copy of the agent's letter to her counsel, adopted and affirmed at the original hearing on this matter, for your consideration. We believe it will enable a full appreciation of Ms. Bauer's predicament.

In the context of the ugly business of narcotics smuggling, we struck a bargain with Josette Bauer. Significant breaks in this enormously lucrative area are few. It was believed that her assistance would help control the international narcotics trade and it, in fact, had precisely that effect. Nonextradition, with its consequent avoidance of her remaining two and one-half year term of incarceration in Switzerland, may have seemed a reasonable price to pay for her cooperation at the time. As it turns out, however, with opportunity for reflection and thorough analysis, Switzerland's right under the treaty to her extradition was not ours to bargain with. We do, however, believe that the equities redound to her favor in any event. It is for this reason that we request that you make known to the Confederation of Switzerland the importance and extent of Ms. Bauer's assistance and the fact that this assistance was attained only by allaying her intense fear of reprisal by effectively assuring her that she would not be returned to Switzerland. Perhaps a thorough and forceful demonstration of these matters will persuade Switzerland to withdraw its extradition request, particularly if that Government understands the importance of Bauer's cooperation to the world community. It is our sincere hope that this course will avoid Ms. Bauer's extradition.

Please know that we greatly appreciate your Department's efforts, both past and anticipated, to resolve this painful problem which is not of your own making. We shall attempt to continue further court proceedings pending our receipt of your advice at your earliest convenience.

ment to withdraw its request for the extradition of Josette Bauer. This diplomatic message is reproduced in full below.[5] Two aspects of the contents of this letter merit particular stress. First, the letter transmitted to

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[5]The Secretary of State presents his compliments to His Excellency the Ambassador of Switzerland had has the honor to refer to the note of the Embassy of Switzerland dated July 22, 1977, concerning Mrs. Josette Geisser-Bauer.

The United States Government has already gone to the United States District Court twice and to the United States Court of Appeals twice in support of the efforts of the Government of Switzerland to extradite Mrs. Bauer. As the Ambassador knows the case was again remanded to the same District Court which has twice enjoined her extradition.

The Deputy Attorney General has written the enclosed letter, dated September 2, 1977, which makes clear that the Justice Department believes that the assurances given to Mrs. Bauer against her being returned to Switzerland were necessary to obtain her "invaluable" information to "frustrate the international narcotics trade." The Department of Justice has vouched for the fact that Mrs. Bauer feared for her life because of her assistance to the United States, should she be returned to Switzerland. The Deputy Attorney General concludes by expressing "sincere hope" that a further demonstration of the importance of Mrs. Bauer's cooperation to the world community will persuade the Government of Switzerland to withdraw its extradition request. The Secretary of State wishes to express that same hope.

In the light of the facts set forth by the Deputy Attorney General and of the course of the previous litigation, it appears unlikely that the courts of the United States will permit Mrs. Bauer's extradition to Switzerland.

In the circumstances, the Secretary of State respectfully urges the Government of Switzerland to reconsider the decision in its note of July 22, 1977, and withdraw its request for the extradition of Mrs. Bauer. In the view of this Department that action would be far preferable, from the standpoint of bilateral relationships and of legal precedent, to the expected action of the District Court to again enjoin that extradition on grounds which the United States Government would find difficult, if not impossible to challenge.

the Swiss government the entire letter from the Deputy Attorney General. Then the Secretary of State adopted the statement of the Department of Justice in its letter which emphasized the importance of persuading the government of Switzerland to withdraw its request. Second, and even more persuasive, the Secretary of State clearly implied that because of the actions of the courts, the United States government found itself in an exceeding embarrassing position which might force it to violate the extradition treaty. The Secretary then made the plea that the Swiss government withdraw its request to avoid placing the United States government in this difficult position.

The Court accepts this communication by the Secretary of State as a strong presentation by the United States government. The Secretary placed the government in the position of being in serious difficulties because of this matter, and, therefore, asking the Swiss government to help out.

In spite of this presentation by the Secretary of State, the Swiss government again asserted its request for extradition in a diplomatic letter dated November 21, 1977. In support of its continued request, the embassy forwarded to the Department of State on February 8, 1978 statements from the heads of the Departments of Justice and Police of the two cantons concerned, Berne and Geneva. These officials certified that they would take all necessary steps to preserve the saftey of Bauer. In both instances outstanding safety records in the prisons were cited. It was stated that in the prison where Bauer would likely complete her prison term, "no case of aggression or homicide (has) ever occurred". In the covering letter the Swiss federal government transmitted these certifications as "ap-

propriate assurances for the complete safety of Mrs. Geisser".

Finally, shortly after the decision by Judge Mehrtens which is now being reviewed on appeal, the Department of State undertook further steps. On November 9, 1978, a diplomatic meeting was held at the Department of State between James E. Goodby, the Deputy Assistant Secretary for European Affairs, and others with Swiss Ambassador and his two first secretaries. The text of the memorandum covering this meeting is reproduced in full in the note.[6]

---

[6]SUBJECT: Bauer Extradition Case
PARTICIPANTS:

USG

James E. Goodby, Deputy Assistant Secretary for European Affairs
James H. Michel, Deputy Legal Advisor
Knute E. Malmborg, Office of Legal Advisor
R. C. Porter, EUR/CE (Notetaker)

Switzerland

Raymond Probst, Ambassador
Daniel Dayer, First Secretary
Hans-Ulrich Mazenauer, First Secretary

Mr. Goodby apprised Ambassador Probst of the US government's wish that Switzerland withdraw its request for the extradition of Josette Geisser Bauer. He summarized the case, noting:

—Mrs. Bauer's testimony was the key to successful procecution of an international drug syndicate,

—She feared for her life were she to be returned to Switzerland,

—Assurances had been made to Mrs. Bauer by a Justice Department representative that she would not be extradited (without the knowledge and consent of the State Department), and

—Mrs. Bauer's extradition continues to be blocked by the US.

[footnote continued]

In this discussion the acute embarrassment of the United States government as well as the fears of Josette Bauer for her life and safety were clearly reiterated. But

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Ambassador Probst commented that Swiss authorities could not accept the view that Mrs. Bauer's life would be threatened in a Swiss prison because of her testimony against the drug ring.

Mr. Michel explained further that the Court had obliged the government to make its "best efforts" to avoid Bauer's extradition, a formulation based upon the assurances given her. These assurances had significantly affected Bauer's rights as an individual under the Constitution. Mr. Michel acknowledged that even after protracted litigation the Court might not be satisfied. He asked that the Swiss Government avoid an impasse by withdrawing its extradition request.

Ambassador Probst responded he understood the US government's obligations to Mrs. Bauer, and noted that there were also obligations to Switzerland under the treaty. He would convey the request to his government, but he personally doubted the extradition request would be withdrawn.

The Swiss Ambassador reviewed the US Swiss Extradition Treaty. He noted the legal obligation of the US government to extradite under the agreement. He commented that if extradition cannot be made, then this is the fault of the US government. One branch of the government had given assurances that should not have been given because of the treaty. As a lawyer, it was Probst's personal view that there must be US recognition of the Swiss right to extradite. "We must be careful," said Probst, "not to create a precedent to be used in another court, in another case".

Responding, Mr. Goodby assured that the US government does not question the legal right of the Swiss government to extradite Mrs. Bauer and that the Bauer case is not viewed as a precedent. Mr. Michel noted that the Bauer case was unique in fact, in its complications. He could not imagine a legal precedent being drawn from the case. Should the Swiss government agree to withdraw its extradition request, the US would regard the step as not impairing in any way the US obligation to respect the treaty.

Probst and Dayer returned again to the question of a possible precedent in Swiss withdrawal of the Bauer extradition request.

[footnote continued]

these assertions fell upon skeptical ears. The Swiss Ambassador did again consult with his government, however. In another meeting at the Department of State on December 18, 1978 between Mr. Goodby and the Swiss Ambassador, the Ambassador confirmed that the Swiss government had again declined to withdraw its request for extradition. He stressed that the Swiss government relied upon the reasons set out in its letter of March 15, 1976. The text of this letter, the most complete and thorough letter which the Swiss government sent in this case, appears below.[7]

Probst worried that it might create a blueprint for fighting extradition.

Michel countered, arguing that there is now a full awareness of the error made in the Bauer case. The US Attorney's manual has been amended by the Department of Justice with instructions that assurances not be given which might impair the fulfillment of US treaty commitments.

He suggested that the worst precedent would be a continuation of the case, risking an adverse judicial decision.

Dayer interjected that the plea bargaining and the US Attorney's assurances in this case had come after the extradition proceeding. Michel observed that it might be better to litigate the issue of possible conflict between a treaty and a plea bargain in a different case and to resolve the Bauer case through diplomatic means by withdrawing the Swiss extradition request.

[7]I have the honor to refer to your letter of February 13, 1976, and to transmit the views of the Swiss Government relating to the extradition of Josette-Clair Geisser, divorced Bauer.

The Swiss Government has given long and careful consideration to the matters discussed in your letter. It has concluded that, in order to preserve its important interests in the administration of justice and its rights under the treaty in question, it must respectfully maintain its request for Ms. Geisser's extradition.

[footnote continued]

It is the conclusion of the Court that these efforts undertaken by the United States government since the

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The Swiss Government continues to feel that the extradition of Ms. Geisser is called for by the United States' treaty obligations to Switzerland and by international law and that therefore the extradition should not be affected by internal United States matters. Further, from a practical viewpoint, the Swiss Government feels that a withdrawal of its request might itself cause harm to the extradition relations between the United States and Switzerland.

As you know, Ms. Geisser, a Swiss citizen, was tried and convicted of aiding and abetting the murder of her father for financial gain in Switzerland. She escaped from Swiss confinement while still having to serve about two-and-a-half years of her sentence. I am sure you can appreciate the strong feeling in Switzerland that Switzerland's system of justice, and our public's deep expectations concerning the fair administration of justice, make it a matter of considerable importance that she be returned to Switzerland to complete her sentence for this heinous crime.

Upon learning of Ms. Geisser's arrest in Florida the Swiss Government immediately took all necessary steps to obtain her extradition, requesting the Department of State to arrange for Ms. Geisser's provisional arrest and detention on September 18, 1967, formally requesting her extradition by the Secretary of State on September 22, 1967, filing an extradition complaint in the United States District Court for the Southern District of Florida on October 4, 1967, obtaining an arrest warrant from that court on October 4, 1967, and obtaining an extradition order from that court on November 21, 1967. Thus, as of November 21, 1967, the Swiss Government had completed all the steps necessary for Ms. Geisser's extradition and merely awaited the decision to extradite by the Department of State.

We have now learned that Ms. Geisser contends that—subsequent to and in spite of the above efforts—she and certain employees of the Department of Justice, without notice to the Swiss Government or the District Court, entered into an agreement, one purpose of which was to prevent her extradition to Switzerland. If this alleged agreement were enforced in the manner requested by Ms. Geisser, the inevitable consequence would of course be to nullify the District Court's order of

[footnote continued]

1977 decision comply with the promise of the government to exercise its best efforts to avoid the extradition of Josette Bauer to Switzerland or France.

These efforts precisely meet the requirements set up by this Court in its decisions in 1975 and 1977. The phrase "best efforts" cannot be interpreted as an absolute. There can be no test demanding that the government has been shown to have failed to exercise its best efforts so long as the extradition takes place. It is clear from the 1975 and 1977 decisions that compliance with the plea bargain does not require a guarantee that Bauer will not be extradited to Switzerland.

"Best efforts" must be interpreted realistically in the world of international relations. Best efforts cannot be interpreted as the "strongest possible efforts". The United States need not go to war with Switzerland to enforce this plea bargain. Nor is it required to break diplomatic relations or take other extreme international measures. This Court could not accept the conclusion that best efforts would require the Secretary of State to travel to Switzerland and talk personally with the top members of the Swiss government. This would require the expending of all of our diplomatic strength and prestige on this particular case. Best efforts can only mean full pursuit of the cause through diplomatic channels in dealing with a friendly nation.

The United States government went beyond a request with reasons stated. It indicated a measure of humilia-

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extradition and the extradition rights of the Swiss Government. As I am sure you realize, the Swiss Government feels that such activities should not affect its rights to extradition.

Please accept, Mr. Secretary, the assurances of my highest consideration.

tion in Secretary of State Vance's letter and in the final conference with the Swiss Ambassador. Yet even this did not persuade. We have no right to evaluate the Swiss point of view that one convicted of patricide who escaped while serving her sentence must complete her debt to Swiss society.

What else is there that the United States government could do within the realm of reasonable diplomatic efforts? It could continue to hold meetings and write letters, but this in turn would ultimately become a violation of our government's treaty obligations. The past history of this case shows that it is unrealistic to assume that at some time the Swiss government would yield and no longer ask that Josette Bauer, a Swiss citizen, be returned to Switzerland to complete her sentence. The Swiss government has shown itself adamant.

It is well to recognize that while properly protecting the constitutional rights of individuals, the courts must tread carefully when they draw conclusions concerning delicate problems of international relations in the world of diplomacy. It is not remiss to note the matter of common knowledge that it is the Swiss government which is representing the government of the United States in Iran today and in negotiations to free the United States government's diplomatic hostages being held in Iran. This Court cannot conclude that the case of Josette Bauer must take precedence over the other important friendly and cooperative relationships between the two nations involved. A "best efforts" promise cannot be pushed so far.

The Swiss government has over and over again rebuffed our requests and protestations. There is not the slightest indication that further negotiation can change

its views. The only alternative which now remains if Bauer is not to be subject to extradition is a decision by this Court which would force the United States government to violate its treaty.

"Best efforts" cannot be taken to require a violation of treaty by the United States. The promise would have to contain stronger and more specific language to force this. This record reveals that in diplomatic terms the government has requested, has tried to persuade several times, and has humbled itself to the Swiss government in its attempt to get the Swiss government to withdraw its request. All of these actions have not availed and there is not the slightest indication in the record that they could avail in the future. No matter how ill-advised this plea bargain may have been in its inception, a best efforts promise cannot force the government to violate its treaty obligations.

In the 1977 decision of this Court it was concluded that the District Court's finding that the government had failed to use its best efforts was not clearly erroneous. Fed.R.Civ.P. 52(a). *Sicula Oceanica, S. A. v. Wilmar Marine Eng. & Sales Corp.*, 413 F.2d 1332 (5th Cir. 1969). It is here concluded that with the undertakings which the government has made since the 1977 decision, the finding of the District Court on remand of the breach of a plea bargain by the government is clearly erroneous. Having now expended its best efforts through having complied with the steps required by this Court in its two prior decisions, the United States government has discharged its obligation under the plea bargain and no constitutional right of Josette Bauer has been infringed.

The decision of the District Court must be vacated, and in this proceeding for habeas corpus and other relief, judgment must be awarded the defendants.

VACATED and JUDGMENT RENDERED for United States of America, Defendant, and Hector Graber, Consul General of Switzerland, Defendant-Intervenor.

APPENDIX B

District Court's Oral Ruling–8/8/73:

THE COURT: Gentlemen, the Court finds from the facts in this case that in order to induce Mrs. Bauer and Mr. Lambert to furnish the Government with information regarding narcotics activities, unquestionably the Government entered into an agreement with those two persons that should they plead quilty to the indictment which was then in existence, they would not be sentenced to over seven years in the penitentiary and that the Government (the Justice Department) would recommend to the Parole Board that they not serve over three years.

Based upon Mr. Earle's testimony, it would seem that he was of the opinion that that, in effect, would have been just a mere formality and there [sic] recommendation would be acted favorably upon by the Parole Board and that he, in effect, was agreeing and promising these two persons that they would not serve over three years.

There seems to be some uncertainty as to the question of deportation. The Court is of the opinion that that matter was undoubtedly discussed and that these defendants were told prior to entering into the plea and prior to cooperating with the Government, that they would be deported to some country other than Switzerland. In other words, the language was used that the Government would use their best efforts to see that this was done. But, if there be any conflict, it would appear from all of the evidence in the case that such an agreement was made between the Government and the defendants Mrs. Bauer and Mr. Lambert prior to their testifying before the Court in the case of United States versus Mori.

In any event, it is the opinion of the Court that these two persons were firmly of the opinion, based

upon the conversations with the Government, and with their attorneys, that there was a definite agreement with the Government that they would not serve over three years in the penitentiary and that they would be deported to some country other than Switzerland or France. I don't think there is any question in my mind but that this was precisely what the Government was promising and what they were agreeing to do.

In the light of that, both Mrs. Bauer and Mr. Lambert fully carried out their portion of the agreement.

It is rather shocking to the Court that the Government would renege on its agreement which it concededly made with respect to the time to be served by these people.

I realize there has been a change in personnel with respect to the present people in the Government office and the people who were active with the Government in handling this particular matter at that time. But the Court is firmly of the opinion and finds that there is a legal obligation upon the part of the Government to carry out what the Court considers to be the agreement, and that is that, with respect to Mrs. Bauer—Mr. Lambert having now been released and having gone to the Netherlands—that she not serve over three years which, as I remarked earlier, leaves the Government in the position of owing her about a year, where she has been kept in prison beyond the period of time which the Government agents promised her that she would not be.

Therefore, I am going to grant the writ of habias [sic] corpus. I am going to order her immediate release from any detention whatsoever with respect to this particular charge.

I fully realize that she is still subject to detention by virtue of being detained by the Immigration & Naturalization Service. However, I find that there is a legal and moral obligation on the part of the Government to see that if Mrs. Bauer is deported, that she be deported to some country which will accept her and certainly not be deported either to France or Switzerland.

I further hold that, in view of the Government's agreement and by their own actions, the order entered in Case No. 67-1010-Civil, Eric Mesmer versus Josette Geisser, divorced Bauer, is no longer enforceable and that the Government has completely and wholly estopped themselves from participating in and recognizing in any manner that decree, and the Court is vacating that decree and is directing the United States Government to proceed to carry out its agreement with this person.

Counsel will please prepare and submit to me written findings and an order.

But, that is my order and it is in effect right now.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF FLORIDA

Consolidated Cases
NO. 73-772 Civ-WM
NO. 73-773 Civ-WM

IN THE MATTER OF THE
PETITION OF JOSETTE GEISSER,
DIVORCED BAUER, a/k/a
PAULETTE LOUISE FALLAI

JOSETTE CLAIRE BAUER NEE
GEISSER a/k/a PAULETTE
LOUISE FALLAI,

vs.

UNITED STATES OF AMERICA

FINAL JUDGMENT GRANTING
WRIT OF HABEAS CORPUS, ETC.

THIS CAUSE came on for trial before the Court this date, upon Petition for Writ of Habeas Corpus, by Josette Claire Bauer—Case No. 73-773 Civ-WM, together with the heretofore consolidated Cause styled "In the Matter of the Petition of Josette Geisser, divorced Bauer, Etc. Case No. 73-772 Civ-WM, and after considering the evidence presented and argument of respective Counsel, the Court makes the following

FINDINGS OF FACT

A. That a definite agreement was made between the Department of Justice, U.S. Government, which provided that Petitioner, together with one Willie Lambert, would receive a maximum sentence of seven years in the penitentiary (with each individual to serve a maximum period of three years before parole), and neither person would be deported to France or Switzerland upon their respective releases from prison.

B. That both Lambert and Bauer, in exchange for said agreement, were required to plead guilty to then pending criminal charges and provide the U.S. Government with the intelligence concerning international drug traffic and testify in all cases made by the U.S. Government as a result of said information.

C. In all respects the Petitioner complied with and executed her part of said agreement, which resulted in major and significant arrests, convictions and policing of intercontinental drug movements and sales.

D. That said agreement was further confirmed between all parties immediately prior to the trial of U.S. vs. Mori Case No. 67-493 Cr at which time Petitioner testified against the Defendant Mori.

E. That it appears that the Petitioner has now served in excess of three years incarceration, in violation of said agreement, and Petitioner is entitled to credit-time-served towards any Federal sentence now pending against her, the exact credit-time-served found now to be two months and nineteen days, plus any good time earned since June 24, 1972, for that, Petitioner was first incarcerated on August 31, 1967 until September 24, 1972—and then reincarcerated on June 24, 1972 to date of these proceedings. Petitioner's further incarcera-

tion, from the date of this Judgment, shall entitle her to such additional credit-time-served as shall be computed from August 8, 1973 to date of release.

F. That the U.S. Government, by its agreement with Petitioner and her subsequent complete cooperation, has estopped itself forever from the enforcement of the Extradition Order entered in Case No. 67-1010 Civil, U.S. District Court, Southern District of Florida, wherein Petitioner was ordered deported to Switzerland upon her release from prison.

G. That the previous, constant refusal of Switzerland to extradite Defendant Mori upon the U.S. Federal charges pending against him in this District, upon which Petitioner testified and Mori was convicted, in no way lessens the import of said agreement, for that Petitioner remained ready, willing and did testify, when called upon (albeit, the extradition of Mori to the United States being accomplished only after Mori had been arrested in France and returned to the United States of America for trial).

THEREFORE, it is, by the Court,

ORDERED AND ADJUDGED AS FOLLOWS:

1. That the Petition for Writ of Habeas Corpus of Petitioner, Josette Bauer be and the same is hereby granted.

2. That said Petitioner stands discharged instanter from any detention imposed in Case No. 67-493Cr United States District Court, Southern District of Florida.

3. That the Order of Extradition entered against Petitioner in Case No. 67-1010, styled "ERIC MESMER V. JOSETTE GEISSER, DIVORCED BAUER, the

above styled District Court, be and the same is hereby vacated, stricken and held for naught, and the U.S. Government is forever restrained from executing or attempt to execute the terms of said Order.

4. That Petitioner, if deported, will be deported only to an acceptable country, expressly excluding France, Switzerland or any of either country's possessions.

5. That the U.S. Government is directed to proceed to carry out its aforesaid agreement with Petitioner.

6. That the U.S. Marshal shall forthwith return Petitioner to Colorado Women's Correctional Institution, Canon City, Colorado, to await disposition of any now pending matters before the United States District Courts.

DONE AND ORDERED at Miami, Dade County, Florida, this 8th day of August, 1973.

s/W. O. Mehrtens
U.S. DISTRICT JUDGE

Copies furnished Counsel

APPENDIX D

Petition of Josette GEISSER, divorced Bauer, a/k/a Paulette Louise Fallai, Petitioner-Appellee,

v.

UNITED STATES of America, Respondent-Appellant.

Josette Claire BAUER nee Geisser, Petitioner-Appellee,

v.

UNITED STATES of America, Respondent-Appellant.

No. 73-3678.

United States Court of Appeals, Fifth Circuit.

May 27, 1975.

Before BROWN, Chief Judge, and GODBOLD and RONEY, Circuit Judges.

JOHN R. BROWN, Chief Judge:

This is an extraordinary case calling for extraordinary action. It is a case of the great United States going back on its word in a plea bargain made by the Department of Justice which assured the Government vital indispensable evidence leading to conviction of principals in a grand scale international heroin importing conspiracy. The effect of part of the bargain was that the defendant-turned-states-evidence would not be deported to Switzerland or France. The other part was that under the sentence imposed she would not be confined

for more than three years. Instead of doing either of these, there is an outstanding warrant and a certificate to the Secretary of State for her deportation to Switzerland on the diplomatic demand of the Swiss chargé d'affairs and the Board of Paroles (Board) has declined to grant parole in terms which would honor the commitment.

To this the Government—speaking through its statutory advocate, 28 U.S.C.A. §509 – offers only the weak justification that notwithstanding breaches of constitutional dimension, there is nothing that can be done about it since (i) the Government by extradition treaty with Switzerland is bound to deport her on demand and (ii) granting release is an unwarranted intrusion into the discretion of the Board as an independent agency notwithstanding the fact that the Board is a subordinate element of the Department of Justice. 18 U.S.C.A. § 4201.

The trouble with this is that in this highly legalistic appeal there is nothing to indicate that the State Department is aware of the bargain or that once informed of it and its breach, the Secretary of State would take the indispensable step which at one and the same time would accomplish deportation and violate the constitutional rights of the petitioner. Similarly, there is no record indication why the superiors in the Department of Justice did not make the proper representations to the Board to carry out the bargain or what the otherwise independent Board would have done had it been fully informed.

Because we are of the view that the judiciary should not be dragged into refereeing this intragovernmental squabble until it is certain that these constitutional problems cannot be avoided, we call on principles

analogous to the doctrine of primary jurisdiction so that in a responsible, factual way the judiciary knows what the real score is. To this end we vacate the orders and remand for further proceedings, with the petitioner remaining free on terms pending final judicial resolution which hopefully will never have to take place.

Josette Claire Bauer is a Swiss national who has an uncompleted prison sentence outstanding against her in Switzerland for the murder of her father. She was arrested in Miami on August 31, 1967 when she and her accomplice, Willy Lambert, attempted to smuggle 28 lbs of heroin into the country aboard a ship.[1] The two "mules"[2] were suspected by Customs and the BNDD of being part of a large Corsican-French drug chain. This conspiracy was known to exist but up until this time the United States officials had been unable to find a link at which to break it.

In an effort to induce their cooperation, the Government investigators disclosed the full extent of the evidence against them to their attorney, James Jay Hogan, who had, incidentally, replaced their initial counsel both of whom had been indicted in the same conspiracy. Confronted with multiple counts and heavy mandatory sentences aggregating many years, Lambert and Bauer quickly reached a bargain with the Government. They agreed not merely to volunteer all their knowledge of the domestic and international drug con-

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[1] The Special Attorney with the Department of Justice, Organized Crime Section, William G. Earle, testified that this was the largest heroin seizure ever made in the United States up until that time.

[2] Earle noted that the two were known as "mules" in drug patois because of their courier status.

spiracy but affirmatively to testify against their superiors in the ring, should they be caught and brought to trial.

For its part, the Government agreed to reindict the two and allow them to plead guilty to a 2 count indictment that carried a combined maximum sentence of 7 years. Their confinement, however, would last only 3 years, after which time they would be paroled.

Lastly, but central to this case, at some point in the negotiations, when Mori—the so-called "traffic manager" of the ring—was finally caught and testifying against him was no longer a hypothetical possibility, Lambert and Bauer balked. They were obsessed by their intense fear of reprisals—a fear all the agents concerned accepted as well-founded. As a consequence, the Government attorneys responsible for the prosecutions promised them that the Government would "use its best efforts to get them to a country other than Switzerland . . ."[3] They were, as a practical matter, protected against deportation to Switzerland.[4]

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[3]The two had some confidence that if the United States would supply them transportation incognito to a "safe" country, they could make it on their own.

[4]Indeed it cannot be better stated for Bauer than as done in the Government's brief:

Thereafter, a bargain was consummated whereby Bauer and Lambert agreed (1) to provide the government with all the information they possessed concerning the international narcotics trade, (2) to provide any evidence they possessed with respect to their original attorneys Prebish and Pollack, and (3) to testify should the need arise. In return, the government agreed to dismiss the indictment against them, under which they faced the possibility of thirty to forty years' imprisonment. They were permitted to plead to a superceding two-count indictment charg-

[footnote continued]

The full impact of both the value of their testimony and the extent of the Government's promises is conveyed in the exhibit letter of William Earle,[5] Special

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ing conspiracy (18 U.S.C. [§] 371) and travel in foreign commerce to facilitate the unlawful importation of narcotics, in violation of 18 U.S.C. [§] 1952. Each was sentenced, pursuant to the parole eligibility provisions of 18 U.S.C. [§] 4208(a)(2), to 2 years' imprisonment on the conspiracy count and five years' on the § 1952 count, the sentences to run consecutively. It was further agreed that they would be released, pursuant to the Department of Justice's recommendation to the Board of Parole, after having served three years' imprisonment.

While there is some confusion and conflict as to the other aspect of the bargain, it is at least clear that Bauer and Lambert, who greatly feared being returned to Switzerland due to anticipated reprisals for their cooperation with the United States government, were assured by a federal representative that the Department of Justice would use its best efforts to assure that neither was deported to Switzerland.

Brief for the Appellant, United States Government, pp. 3 and 4.

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February 15, 1973
Miami, Florida

William C. Marchiondo, Esquire
Marchiondo & Berry, P.A.
Post Office Box 568
Albuquerque, New Mexico 87103

Dear Mr. Marchiondo:

The following is in response to your request for information:

My name is William G. Earle, and I was a Special Attorney with the Department of Justice, Organized Crime Section from 1966 through late September, 1969. I was assigned primarily to Miami. In connection with my duties as a Department of Justice, Organized Crime Attorney, I worked closely with the United States Attorney's Office and was involved in all of their corruption and organized crime investigations, including major narcotics investigations. I worked with the United States Attorney's Office and was the Justice Department attorney responsible for the heroin smuggling cases involving Josette Bauer and Willy

[footnote continued]

Attorney to the Department of Justice Organized Crime Section. The letter demonstrates that the assurances of

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Charles Lambert. Josette Bauer and Willy Lambert were arrested on August 31, 1967, after bringing 14 kilos of heroin into Port Everglades, Ft. Lauderdale, Florida. At the time of their arrest, this was the largest, or one of the two or three largest heroin confiscations, or heroin seizures ever made in the United States. I was immediately notified by U.S. Customs Agents Alan Yarborough and George Corcoran, and was involved in the investigation from the outset. My reasons for being involved and our primary objectives in this investigation were twofold. Firstly, Josette Bauer and Willy Charles Lambert were only "mules" in the operation. They were just couriers, carrying the heroin into the United States. We wanted to get to the real supplier that were behind Bauer and Lambert. We wanted not only to secure convictions of the people that were immediately above Bauer and Lambert in the heroin organization, but to get as much information as we could about the French, Corsican and European heroin organizations. In 1967 there had not been the wave of major heroin smuggling cases that have since occurred. The knowledge of the French and Corsican organizations was very sketchy, and there certainly was no hard evidence that would lead to arrests, indictments or convictions of anybody outside the borders of the United States. This case, then, provided a potential breakthrough.

Immediately then, we pursued an objective of attempting to get the cooperation of Bauer and Lambert in return for a lighter sentence than they would otherwise receive. They could have been sentenced to 40 years on substantive and conspiracy counts of smuggling heroin. After being represented briefly by Paul Pollack, Esq. and Harry Prebish, Esq., they retained attorney James Jay Hogan to represent them, and Mr. Hogan and I began a series of conversations. I outlined the ironclad case we had against Bauer and Lambert and attempted to convince Mr. Hogan to convince his clients that their best interests lay in cooperating with the United States Government. The Grand Jury returned an indictment on September 25, 1967, indicting Josette Bauer, Willy Charles Lambert and Robert Mori and charging them with substantive and conspiracy violations of 21 U.S.C. § 174. These counts carried minimum mandatory sentences of 5 years on each count. After lengthy negotiations with Mr. Hogan a deal was struck. The deal was that Bauer and Lambert would tell the

[footnote continued]

the government were emphatic and without them the two would never have testified.

United States Government all they knew about narcotics smuggling and the narcotics organization in Europe, mentioning names, places and dates: everything they knew. They would also tell us the entire situation concerning the relationship between them, the missing heroin, and their original attorneys, Paul Pollack and Harry Prebish; we would reindict them so that the maximum sentence would be 7 years, but, in any event, we would see to it that if they cooperated they would not serve more than 3 years. We also mentioned that if they cooperated, we would do everything possible to see that they would be deported to a country other than Switzerland. We did discuss specific countries, no guarantees were given, but at a later time I did discuss with Willy Lambert and Josette Bauer the possibility of their being deported to South America. Before making the deal with Hogan, we wanted some assurance that we were not buying a "pig in a poke." I asked Hogan to talk to Bauer and Lambert and to give me some idea of the information they had. He talked to them and told me the type of information they could give. I relayed this to Bill Lynch and Henry Petersen of the Justice Department in Washington and they agreed that this type of information was significant and we should proceed to make the proposed deal with them.

At the time we entered into this deal I, the Justice Department, and the United States Attorney's office, were each aware of the fact that there had been extradition proceedings and that Josette Bauer had been ordered extradited to Switzerland at the conclusion of whatever sentence she would receive in the heroin case. Those extradition proceedings took place in late November of 1967. I was present at that extradition hearing, although I was just an observer.

I did state to Mr. Hogan and to Bauer and Lambert on every occasion that we discussed the deportation that we would do everything possible to see that they were deported to a country other than Switzerland. I met with Bauer and Lambert many times between 1967 and 1969, and on almost every occasion that we met the subject of their deportation to a country other than Switzerland was discussed. I always told them that the Department of State could throw a wrench into this, but I didn't think that they would in light of the fact that the Swiss

[footnote continued]

The ability of the Government to fulfill this last promise to Bauer is complicated by ancillary extradition

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Government had not given us any cooperation when we needed it in this investigation. In fact, my information, which was given to me by customs agents, was that the Swiss had not only not cooperated, but had gone out of their way to prevent the extradition of Robert Mori or, at the very least, failed to arrest Mori while surveilling him with knowledge he was under indictment in the United States. Customs agents were quite upset over the failure of the Swiss authorities to cooperate in our investigation, and it was this failure to cooperate that gave all of us in the Department of Justice the feeling that the Department of State would surely go along with the deal that we were making to deport them to some country other than Switzerland, if at all possible.

With regard to the deportation, I am not certain whether this was part of the original deal. I know at some stage before Customs debriefed Bauer and Lambert we stated that if they cooperated, we would do everything possible to get them deported to a country other than Switzerland.

There is no doubt that Bauer and Lambert cooperated beyond 100%. They were completely debriefed by U.S. Customs and other officials of the United States Government. Their cooperation led to numerous arrests, indictments and convictions of major narcotics figures in France and the United States. They testified in two major cases and I have been repeatedly told by U.S. Customs officers of the "fabulous" information given by Lambert and Bauer. It was my understanding from customs agents and narcotics agents who have better knowledge of this, that the information supplied by Lambert and Bauer was the beginning of the major breakthrough of the French, Corsican and European narcotic organizations.

I feel every effort should be made to deport Josette Bauer to a country other than Switzerland. I think it would be a breach of our agreement were the Justice Department and the Department of State not to do everything possible to arrange this.

Although my memory of the negotiations with James J. Hogan and my conversations with Bauer and Lambert are not complete and I have not had an opportunity to review my Justice Department file on this or the memorandum that Michael

[footnote continued]

proceedings brought against her by the Swiss Government before Judge Atkins in the Southern District of Florida under 18 U.S.C.A. § 3184. An order certifying

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Osman and I submitted to the Justice Department concerning Mr. Lambert's deportation, which memo was made in 1969 when the events were fresh in my mind, I do have the abiding feeling that Lambert and Bauer were entitled to believe that the United States Government would make every possible effort to see that they were deported to a country other than Switzerland.

In my numerous meetings with Josette Bauer and Willy Lambert between 1967 and 1969, they repeatedly expressed concern about whether or not the United States would extradite them to Switzerland. They feared for their lives if forced to return to Switzerland. They understood, however, that it was not an ironclad promise that we would extradite them to a country other than Switzerland. They did understand that our promise was to use our very best efforts to extradite them to someplace other than Switzerland. As time passed they became concerned that, in fact, we were doing nothing; that in fact the Department of Justice had never approached the Department of State; and that we were giving them a lot of "hot air." On many occasions after speaking with them I would call Bill Lynch in Washington and remind him of the fact that we had made a deal that they were to get out in 3 years and that we were to do everything we could to get them deported to someplace other than Switzerland.

Subsequent to my leaving the Department of Justice in September, 1969, I received a handwritten letter from Willy Lambert, a copy of which is attached hereto, and I wrote a letter to Michael Osman, Assistant United States Attorney, a copy of which is attached hereto. In that letter I referred to a memo which Mr. Osman and I had prepared and submitted to the Department of Justice sometime before September, 1969, in which we expressed our concern that the United States Government was not honoring its deal with Bauer and Lambert. I have not seen a copy of that memo since leaving the Justice Department and I am certain that memo will set forth many of the facts which I am unable to recall at this time. I have had many conversations with Mr. Osman in which we each expressed our concern that the United States Government was not going to live up to the bargain it made with Bauer and Lambert.

[footnote continued]

to the Secretary of State the extraditability of Bauer was granted November 2, 1967 without Judge Atkins having any apparent awareness that Bauer was then or would shortly be involved in plea negotiations with the Government.[6] Whatever might have been the duty of the United States Attorneys to intercede in the extradition hearing, it is a certainty that the Government attorneys were entirely aware of the outstanding order at the time they bound the Government to "use its best efforts" to insure her deportation to a "safe" country.

Bauer and Lambert kept their bargain. They supplied information that in the words of William Earle, Special Attorney to the Department of Justice Organized Crime Section, was "the first crack in breaking down the entire international narcotics conspiracy." Judge Mehrtens, who presided at the conspiracy trial and later at the habeas hearing, recalled that Josette Bauer was the more valuable of the two witnesses at the Mori trial and that "... she was one of the most impressive witnesses I have ever seen in a lawsuit. The witness had

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In reviewing the documents attached hereto and certain letters shown to me by you from Willy Lambert to Michael Osman, and from Mr. Lambert to James J. Hogan, and from Michael Osman to William F. Lynch, dated respectively August 13, 1970, July 29, 1970 and May 5, 1970, I can state that the contents of those letters accurately reflect the situation as I recall it.

Very truly yours,
(s) William G. Earle
William G. Earle

WGE:c

[6]The United States Attorney was not of counsel on the case, the interests of Switzerland being handled by a privately employed Miami attorney. James Jay Hogan took an active part on behalf of Bauer.

a remarkably retentive memory as to dates, places and times . . . without Mrs. Bauer—I am quite sure Willy [Lambert] would have been able to testify to only about one-tenth of what Mrs. Bauer testified to."

Mori was convicted and sentenced to 20 years in prison. Bauer and Lambert began to serve their own sentences on December 1, 1967, anticipating that the Government would keep its promises. But, as the two-year mark approached, they began to get overtures from Swiss and French investigators seeking information. Specifically, Josette Bauer was told by Customs Agent Alan Yarborough who conferred with her in prison that the Swiss Government wanted her badly enough that they were willing to send 2 agents here to talk to her. According to her testimony, Yarborough told her that the Government was not going to be able to keep its promise and prevent her deportation to Switzerland.[7] Highly agitated by these events, within the month she escaped on October 10, 1969 from her prison in Alderson, West Virginia. For two years she lived in Albuquerque, New Mexico.[8] She was captured on June 25, 1972 and on May 1, 1973 she was snetenced to serve 18 months for the escape to run consecutive to her remaining sentences. When she returned to prison, the Department of Justice expressly

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[7] Agent Yarborough denied having made this statement in his testimony. But other evidence of the government's apparent lack of concern for the bargain in 1969 is a memo written by Earle to William S. Lynch, Chief of the Organized Crime Division on August 8, 1969, reminding him of the government's responsibility to Lambert and Bauer which was prompted, according to Earle, by his fears that they would be forgotten. See note 24, *infra.*

[8] There she ran her own riding school for a time.

disavowed the agreement and on June 14, 1973 her application for parole was denied by the Board which directed that she serve out the remainder of her 7 year Miami narcotics sentence.

Meanwhile, Lambert remained in prison. As the three-year point approached, he and his counsel were surprised to discover that nothing had been done on his behalf by the Government to increase the likelihood of his parole. His counsel contacted the Assistant United States Attorneys and other government officials with whom he had negotiated the plea bargain and at their urgings the Department of Justice finally acted. In response to its recommendation, the Board granted the parole. Following his release, U.S. Marshals escorted Lambert to the airport where he bought a ticket with his own money to the Netherlands. Nevertheless, his hopes of safe passage to a sanctuary were unrealistic because his presence on the plane was somehow known to the Swiss. He was met at the Netherlands airport and immediately removed to Switzerland. At the time of Bauer's habeas hearing, Lambert's attorney in response to inquiries had heard no word from his for over a year.

Now Josette Bauer returns to court, hoping that her case will have a better outcome than that of her co-defendant. She seeks to compel the Government to live up to its plea bargain by specifically enforcing the plea agreement and enjoining the extradition order. She charged that the order amounted to an unlawful detainer by the Secretary of State because it violated the plea bargain and because the Swiss offense did not fall within the terms of the extradition treaty.

After an extensive hearing Judge Mehrtens found that there was a specific, definite agreement that she would

not serve over 3 years and that she would be deported to some country other than Switzerland or France.[9] Bauer was discharged from any further detention imposed as a result of her Miami narcotics conviction[10] and the District Judge set aside and enjoined the execution of the extradition order. He directed that if it was determined that she should be deported, it would be only to an "acceptable" country—not France, Switzerland or the possessions of either.

On appeal, the Government does not challenge the findings of fact of the District Court. It accepts these but objects instead to the method and timeliness of the District Court intervention in the case. The Government argues that (i) Bauer's habeas action is premature because the extradition order has not issued due to her

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[9] In his formal findings the District Judge was positive on both parts of the bargain:

> that a definite agreement was made between the Department of Justice, U.S. Government, which provided that petitioner, together with one Willie Lambert, would receive a maximum sentence of seven years in the penitentiary (with each individual to serve a maximum period of three years before parole), and neither person would be deported to France or Switzerland upon their respective releases from prison.

[10] At our request, the Department of Justice has supplied us with Bauer's sentence computation record. It shows that she began to serve the escape sentence after she was released by Judge Mehrtens on May 14, 1973.

Narcotics Sentence	Escape Sentence
began: 12-1-67	began: 5-14-73
escape: 10-12-69 to 6-25-72	ended: 7-28-74
	(with good time credit)

Post-escape incarceration
6-25-72 to 5-14-73

incarceration for 5 more years on the two consecutive sentences, (ii) the judgment should be vacated for petitioner's failure to join the Confederation of Switzerland as an indispensable party under F.R.Civ.P. 19(a) because of its direct interest in the person of Josette Bauer; (iii) and the District Judge usurped the exclusive power and responsibility of the Board by releasing Bauer.

As we pointed out in the prologue, at the core of each of these arguments is the essential fact that the Government occupies a schizophrenic position. The Department of Justice, having made a bargain that it would do its best to influence the actions of the independent sister branches of the Government—the State Department and the departmental subordinate, the Board—and having convinced Josette Bauer that it would in all likelihood be successful, claims to find itself with contradictory commitments—to Josette Bauer and the Swiss Government.

Assuming, as insisted upon by the Department of Justice, that the deportation-extradition commitment was not the absolute one found by the Court (see note 9, *supra*) but the more limited one to use its "best efforts," this record and the very fact of this appeal shows an outright failure to comply. The best effort would, at a minimum, be a strong presentation to the Department of State as to what had been promised and the likely dangers to the bargainee-defendant-witness. But the record is silent. All we have is the legalistic position voiced by the Department of Justice as the official spokesman that this has to occur under statutes and treaties.

But we are not at all sure that a Secretary of State who is instructed by the chief legal officer of the

nation that failure to keep the bargain is a plain violation of Bauer's constitutional rights would persist in the steps to effectuate extradition.[11]

Similarly, the Department of Justice had the minimum duty of advising the Board of the trade and the importance to the public interest of its being honored. Yet the Department did not do that. To the contrary, it actively opposed the granting of parole which would effectuate the promise of a three-year confinement. We recognize that in a structure of independent quasi-adjudicative agencies within an Executive department there is and should be no hierarchical intrusion into the exercise of administrative discretion. At the same time, that agency needs to be advised in positive terms of the agreements made, the consequences of which were (i) rich in terms of the public interest and (ii) of constitutional consequences to the bargainee if not honored. But, as discussed, we are likewise in the dark. The Department of Justice which has at least some supervision over this agency tries to force us into deciding whether a Court can intrude before the Judiciary has reliable information that the Board would not correct its own errors once it is fairly advised.

What is needed in this international plot is an authoritative declaration of the position of *the* United

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[11]Since we conclude that the bargain as determined by the District Court fits well within the realm of enforceable constitutional rights of the petitioner, Santobello v. New York, 1971, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427, the power of the Secretary of State may well be circumscribed by Reid v. Covert, 1957, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148, holding individual constitutional rights superior to the Government's treaty obligations.

States Government—not just that of one or more departments or agencies.

It is at this point we invoke principles akin to primary jurisdiction. This invaluable doctrine has evolved from what was originally a means of preventing courts from overriding agency jurisdiction[12] to become a means to flexibly harness the resources of agency or departmental expertise to the judicial decision-making process.[13] We have repeatedly benefited by the use of this mechanism.[14]

It has special usefulness in a case such as this where the District Court and this Court need to know just exactly what the Secretary of State proposes to do in the light of this confessed failure to keep the faith. Without this unified sovereign pronouncement, we strike out blindly to formulate a judicial remedy with unknown and weighty variables, not the least of which is treading upon delicate international relations.

Once the concept is properly understood, there is ample precedent for this demand for a governmental

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[12]Texas and Pacific Ry. v. Abilene Cotton Oil Co., 1907, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553.

[13]L. Jaffe, Judicial Control of Administrative Action 121-48 (1965).

[14]Mobile Oil Corp. v. Oil, Chemical and Atomic Workers International Union, AFL-CIO, 5 Cir., 1975, 504 F.2d 272 (en banc) (Brown, C. J., Dissenting); J. M. Huber Corp. v. Denman, 5 Cir., 1966, 367 F.2d 104; Weymouth v. Colorado Interstate Gas Co., 5 Cir., 1966, 367 F.2d 84; Carter v. American Telephone & Telegraph Co., 5 Cir., 1966, 365 F.2d 486; Louisville & N. R. R. v. Knox Homes Corp., 5 Cir., 1965, 343 F.2d 887; Agricultural Transportation Assn. of Texas v. King, 5 Cir., 1965, 349 F.2d 873; River Terminals Corp. v. Southwestern Sugar & Molasses Co., 5 Cir., 1958, 253 F.2d 922, aff'd, 1959, 360 U.S. 411, 79 S.Ct. 1210, 3 L.Ed.2d 1334.

resolution of its total position. For example, in shipping cases,[15] the Supreme Court directed that the courts defer review until the Federal Maritime Board had the opportunity to consider the legal issues. In both *Cunard* and *Far East* the parties had generally complained that the actions of a conference of carriers in operating a dual system of shipping rates that benefited those shippers that contracted exclusively with the conference members violated the anti-trust laws. Subsequently in *Isbrandtsen*, the Court outlined the vital role of the administrative, executive determination:

> It is, therefore, very clear that these cases, while holding that the Board had primary jurisdiction to hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack. Rather, those cases recognized that in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed. Compare Denver Union Stock Yard Co. v. Producers Livestock Marketing Assn., ante [356 U.S.] p. 282 [78 S.Ct. 738, 2 L.Ed.2d 771]. It is recognized that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's

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[15]Far Eastern Conference v. United States, 1952, 342 U.S. 411, 79 S.Ct. 1210, 96 L.Ed.2d 576; United States Navigation Co. v. Cunard, S. S. Co., 1931, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408; Maritime Board v. Isbrandtsen Co., 1957, 356 U.S. 481, 78 S.Ct. 851, 2 L.Ed.2d 926.

> superiority in gathering the relevant facts and in marshaling them into a meaningful pattern. Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation.

Maritime Board v. Isbrandtsen Co., 1957, 356 U.S. 481, 498, 78 S.Ct. 851, 861, 2 L.Ed.2d 926.

What we are saying is that the United States Government must in the light of the commitment made by its prosecutorial arm look carefully at the constitutional obligations owing Bauer. When it looks—whether through the advocative eyes of the Attorney General or through those of the Secretary of State, whose oath of office calls for support of the same constitution—all will see *Santobello*[16] as a lion in the streets. There the Court reversed the conviction of a defendant who pleaded guilty after agreeing with one prosecutor that no sentence recommendation would be made only to have a new prosecutor recommend the maximum punishment at the time of sentence. Despite the fact that the sentencing Judge emphasized that, in view of the defendant's prior record, the absence of a recommendation by the prosecutor would have made no difference in the sentence, the Supreme Court found that the impact of such a breach justified reversal. In the words of the Chief Justice:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a

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[16]Santobello v. New York, 1971, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427.

> constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello v. N.Y., *supra* at 262, 92 S.Ct. at 499. As a remedy, the case was returned to the state court for a determination of whether the appropriate remedy was specific performance of the promise before another Judge or an opportunity to withdraw the plea.[17]

Thus, following *Santobello*, defaulted plea bargains must be remedied. But the avenues of redress available for Bauer are few. Eradicating the impact of her testimony is impossible. And, of course, an opportunity to replead seems superficial and unrealistic in view of her long confinement. Specific performance may well be the only way out to keep the bargain.

'Although it poses none of the delicate problems of international relations and the effectuation of treaties, *Santobello* stands for much more in assaying the failure of the Department of Justice to take honorable but effective action before the Board to secure her release at the end of the promised three years. The Government does not even begin to whisper the faintest suggestion of a possible reason why it did not—in advance of the approaching three-year expiration—make the appropriate representations to the Board.[18] All it

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[17]*See* Santobello v. New York, *supra* at 267, 92 S.Ct. 495, where in a note to his partial dissent Justice Marshall concludes that a majority of the Court held the view that the choice of the defendant should be binding on the Court.

[18]On oral argument, but without record support, we were told that William S. Lynch, head of the Organized Crime Division of

[footnote continued]

can do is to faintly urge that the District Judge's action usurps the exclusive role and independence of the Board, citing: Tarlton v. Clark, 5 Cir., 1971, 441 F.2d 384; Buchanon v. Clark, 5 Cir., 1971, 446 F.2d 1379; Thompkins v. United States Board of Parole, 5 Cir., 1970, 427 F.2d 222; Simon v. United States (E.D.La., 1967), 269 F.Supp. 738, aff'd, 1968, 397 F.2d 813.

Sharing as we do the Government's concern about judicial intrusion into the parole process,[19] we defer until after remand whether we would put our stamp of approval on the District Judge's order which in effect releases Bauer at the end of the reconstructed three-year term.[20] We do this because remand offers an ample opportunity for the judiciary to be informed of exactly (i) what would have taken place by the Board had the Department of Justice kept its word, and (ii) what would now take place if, on a full disclosure of the positive commitment and the consequent violation of Bauer's constitutional rights, the matter would be re-submitted to the Board. Both the Board and its hierarchical superiors are to respond authoritatively on this.[21]

Several things are to be accomplished by and on the remand. The Government shall, after consideration of

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the Justice Department, considered that her escape voided the 3-year commitment. But that might well depend upon the factual basis for her actions and particularly her apprehensions based upon her impressions of what Agent Yarborough told her. (See note 7, *supra.*)

[19]Scarpa v. U.S. Board of Parole, 5 Cir., 1972, 468 F.2d 31, rev'd, en banc, 1973, 477 F.2d 278, vacated as moot, 414 U.S. 809, 94 S.Ct. 79, 38 L.Ed.2d 44.

[20]See note 10, *supra.*

[21]United States v. Nixon, 1974, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039.

the promise made and the failure to keep all or part of it by the respective officials at the highest levels, state unequivocally the position of the United States Government. In the event that position does not result in the effectual release of Bauer from the restraints or prospects or threats thereof, the District Court shall conduct further hearings after allowing fullest discovery on all issues and particularly on the question of just what has been done with the promise "to use our best efforts" and the reasons why, if any, steps have not been taken or why they have been ineffectual.[22]

The Government asserts that, in any event, the case is not ripe since, if the prison term remains effective, the deportation cannot take place for several more years. We reject this for several reasons. To begin with it assumes that the order releasing her from further confinement will be reversed. But more basically, her very personal interests are so vitally affected that the situation of threatened return to prison and later extra-

[22]Since this involves international relations we think our decision on the extent of the Secretary of State's discretion in declining extradition should be postponed. Ashwander v. T.V.A., 1936, 297 U.S. 288, 345-48, 56 S.Ct. 466, 482-84, 80 L.Ed. 688, 710-12 (Mr. Justice Brandeis concurring); Texas v. Grundstrom, 5 Cir., 1968, 404 F.2d 644. Commentators appear to agree he has discretion to review the magistrate's holding that the Treaty requires extradition, although perhaps not absolutely. 4 Hackworth, Digest of International Law §338 (1942); 4 Moore, International Law Digest §616 (1906); Note, Executive Discretion in Extradition, 62 Colum.L.Rev. 1313 (1962). As evidence of the Secretary's presumed discretion to extradite a person who is found to be extraditable the government cites Wacker v. Bisson, 5 Cir., 1965, 348 F.2d 602. And the law seems to recognize the power to grant asylum. *See*, United States v. Rauscher, 1886, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425; United States v. Mulligan, 2 Cir., 1934, 74 F.2d 220.

dition constitutes sufficient custody.[23] Undoubtedly, Josette Bauer is harmed if there is any likelihood that the Government will not stand by its promise irrespective of whether she is five minutes or four years from deportation.

This brings us to the contention that the case must be dismissed (or vacated and remanded) for failure to join the Confederation of Switzerland under F.R.Civ.P. 19(a)(2). Again there are several reasons why we reject this. At the outset this is raised for the first time on appeal[24]—itself a factor which may be evaluated in

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[23]*See generally*, Jones v. Cunningham, 1963, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (prisoner on parole in custody for purposes of habeas corpus proceeding); Marden v. Purdy, 5 Cir., 1969, 409 F.2d 784 (one free on bond may be in custody to petition for habeas relief).

[24]For one asserting a mandatory compliance with Federal Rules of Civil Procedure, the Department of Justice's position is pretty shaky. In its formal answer to the application for the writ it filed a 12-line blunderbuss reply in which it stated:

> The alleged agreement was entered into sometime between August 1967 and April 1973. The parties representing the Government, Michael Osman and William Earle, are no longer associated with the Justice Department. The Government is therefore in no position to admit or deny an agreement with petitioner.
>
> The only proper remedy for petitioner is to prove the existence of the agreement and its nonperformance.

If this barely complied with the outlawed general denial, it certainly did not with F.R.Civ.P. 11 in which the effect of the filing of a pleading is a certificate by counsel that it is filed in good faith in the belief that it is well-founded. At the moment of the filing of that "answer" on May 25, 1973, the Department of Justice already had the memo prepared by Earle in August 1969, while he was still employed there, restating the bargain and expressing his fear that it would not be honored and Osman's 1970 letter to William Lynch, Chief of the Organized

[footnote continued]

considering joinder. Provident Bank & Trust v. Patterson, 1968, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed. 936.

Next, the Federal Rules have only limited application to habeas proceedings. In 1969, the Supreme Court considered the applicability of the Federal Rules to habeas proceedings in the context of discovery. Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (construing F.R.Civ.P. 81(a)(2)). The Court referred to a "considerable debate" over the applicability of the joinder rules, and expressly "intimate[d] no view." 394 U.S. at 294 n.5, 89 S.Ct. at 1088, 22 L.Ed.2d at 288.

The Court did, however, point out the remarkable expansion of the habeas remedy's scope since the institution of the Federal Rules in 1938, the critical date in using the "conformity" test. A great deal of that expansion has come in defining "custody." *E.g.*, Peyton v. Rowe, 1968, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426; Jones v. Cunningham, 1963, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285. Even today, however, we have considerable doubt that concept has enlarged to the point Switzerland *alone* could be named as a habeas respondent in this situation. And the Government has especially failed to indicate any pre-1938 authority to the effect that one not physically a custodian of petitioner's body is a proper party-respondent.[25] We conclude that Rule 19 is not in

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Crime Division on behalf of Lambert. Mr. Osman was then serving as United States Magistrate in Miami as the United States Attorney's staff well knew. Both of these knowledgeable persons were readily available in Miami to ascertain the facts which were later testified to showing the broken promise.

[25]We find support for our conclusion in the Proposed Rules Governing Habeas Proceedings, Committee on Rules of Practice

[footnote continued]

"conformity" with pre-1938 practice—and, therefore, not applicable in this case.

More important, under the solution we mandate there may not even be any judicial order required to carry out the bargain. If Switzerland feels aggrieved at such a possible executive-political resolution, its avenues of redress would more likely be through diplomatic means or in international tribunals.

Vacated and remanded.

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and Procedure of the Judicial Conference of the United States (January 1973), promulgated in response to authorization. Reports of the Proceedings of the Judicial Conference of the United States (October 1969). Proposed Rules 2(a) and (b) specify exactly who shall be named as respondent and specifically in terms of successive future custodians. Yet the Proposed Rules do not undertake to comprise a complete system of procedure, Proposed Rule 12. From the draftsmen's specifically designing a new Rule governing joinder, there is a strong indication that they, too, concluded Rule 19 is presently of little, if any, application to habeas proceedings.

APPENDIX E

Petition of Josette GEISSER, Divorced Bauer, a/k/a Paulette Louise Fallai

Josette Claire BAUER, nee Geisser, a/k/a Paulette Louise Fallai,

v.

UNITED STATES of America

Alfred Keller, Consul General of the Government of Switzerland, Applicant for Intervention.

Nos. 73-772-Civ-EM, 73-773-Civ-WM.

United States District Court,
S. D. Florida,
Miami Division.

May 21, 1976.

OPINION

MEHRTENS, District Judge.

The United States Government has moved, after remand of this matter by the Fifth Circuit Court of Appeals,[1] to dismiss the petition for habeas corpus filed by Josette Bauer in this Court. The Court of Appeals vacated an earlier order which granted the petition, and directed that further proceedings be had to receive evidence of "just exactly what the Secretary of State proposes to do" (513 F.2d 862, at 870) in light of the Government's "confessed failure to keep the faith" (id.) in respect of promises made to the petitioner by the

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[1] *Geisser v. United States*, 513 F.2d 862 (5th Circuit 1975).

Department of Justice to prevent petitioner's extradition to Switzerland.[2]

At the subsequent hearing, the Government introduced evidence that on October 9, 1975 more than four months after the appellate decision was rendered,[3] the Department of Justice for the first time exerted any efforts[4] to bring to the attention of the Department of State its commitment to Mrs. Bauer. The Fifth Circuit correctly observed that there previously had been an outright failure by the Government to comply with either the limited "best efforts," contended for by the Government, or with the absolute promise found by this Court to prevent her return to Switzerland. It suggested that, at a minimum, the Department of

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[2]The Opinion of the Court of Appeals recites, at 513 F.2d 864, that petitioner was "as a practical matter, protected against deportation to Switzerland" in exchange for invaluable information concerning an international narcotic conspiracy; thus, apparently, agreeing with the finding made by this Court in August, 1973 that she would not be deported following her release from a plea-bargaining conviction.

[3]On the other hand, counsel for petitioner presented to the Court in January 1976, a letter sent by him in July 1975 to the Secretary of State, three months before the Government acted, in which the Secretary was requested to advise the Court of its intentions concerning the promises made by officials of the Justice Department. A copy of said letter was sent to the Department of Justice. Neither the State Department, the Department of Justice, nor any other agency of the United States Government has ever responded to the letter from plaintiff's counsel.

[4]The Government does not deny that as early as 1967 it had commenced negotiations for Josette Bauer's cooperation, promising to use, at least, its "best efforts" to prevent her return to Switzerland. In fact, no effort whatsoever was made until October 1975.

Justice should have made "a strong presentation to the Department of State as to what had been promised *and* the likely dangers to the bargainee-defendant-witness." (513 F.2d at 869). I cannot help but note that the Department of Justice, in its belated 1975 communications with the Department of State, never once mentioned petitioner's well-founded fears for her life should extradition be effected as a matter of a primary concern to both the United States and Switzerland. Perhaps the State Department might have been more persuasive in obtaining agreement from the Swiss Embassy if this aspect of the bargain had been as forcefully presented by Justice as was Justice's concern for the "difficulties for the Department of Justice in its relationship with the judiciary."[5]

In any event, it now appears that Switzerland declines to withdraw its request for petitioner's extradition, and the Department of State declines to withhold extradition under any claim of discretionary authority to do so, or to pursue other avenues in her behalf which were suggested by the Appellate Court.[6] In this posture, and following the dictates of the appellate decision rendered in this matter, it becomes necessary for me to determine exactly what effect the dilatory

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[5] Letter from Deputy Attorney General to the Secretary of State, October 9, 1975, attached to Government's Motion to Dismiss Petition.

[6] It appeared to the Fifth Circuit Court of Appeals that *Ashwander v. T.V.A.*, 297 U.S. 288, 345-48, 56 S.Ct. 466, 482-483, 80 L.Ed. 688, 709-711 (1936); *Wacker v. Bisson*, 348 F.2d 602 (5th Circuit, 1965); and *Texas v. Grundstrom*, 404 F.2d 644 (5th Circuit 1969), and several worthy commentators recognize such discretion; but, moreover, that the safeguard of asylum was another key to the solution that might be employed. See Court's footnote 22 at 513 F.2d 870.

efforts of the Government to fulfill its promises (and the unsuccessful conclusions, insofar as Bauer's future is concerned, of those efforts), shall have upon what this Court considers the overriding issue in this entire matter: What is to be done to protect Josette Bauer's *Santobello*[7] rights, in view of the disparate positions[8] taken by the co-equal Departments of Justice and State regarding her extraditability? The Court of Appeals most aptly, and with justifiable wryness, remarked upon the conspicuous impossibility of petitioner's redress for the Government's breach of faith if specific performance of its promises were not to be ordered. This Court fully agrees with that assessment of the dilemma.

The United States Government failed in both of its promises: It did nothing, for eight years, to protect petitioner from being turned over to Swiss authorities; further, it presented no evidence, at any time during any of the proceedings in this matter—and contrary to the directions of the Court of Appeals[9]—concerning any

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[7] *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

[8] The Court of Appeals stated it thusly: "As we pointed out in the prologue, at the core of each of these arguments [that the petition was premature and procedurally defective as well], is the essential fact that the Government occupies a schizophrenic position. The Department of Justice, having made a bargain that it would do its best to influence the actions of the independent sister branches of the Government—the State Department and the departmental subordinate, the Board—and having convinced Josette Bauer that it would in all likelihood be successful, claims to find itself with contractory commitment—to Josette Bauer and the Swiss Government."

[9] ". . . [R]emand offers an ample opportunity for the judiciary to be informed of exactly (i) what would have taken place by the Board had the Department of Justice kept its word, and (ii)

[footnote continued]

efforts to obtain from the Board of Paroles a determination of what would be done to respect the Government's promise that petitioner would not serve more than three years in prison. Petitioner has thus been doubly dishonored: by Government inaction, and by a woeful lack of integrity on the part of government officers either to acknowledge its obligations or to obey the mandate of the Court.

The language of *Santobello* quoted by the appellate court in its opinion,[10] i.e.,

> "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled,"

compels, I think the result originally reached in this matter.

The Government takes the position that because it has now exerted its "best efforts" to carry out its part of the bargain—albeit long past any reasonable time for recognizing that obligation to do so; and only because required to do so by judicial mandate; and, without any

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what would now take place if, on a full disclosure of the positive commitment and the consequent violation of Bauer's constitutional rights, the matter would be resubmitted to the Board. Both the Board and its hierarchical superiors are to respond authoritatively on this."

[10] *Geisser v. United States*, 513 F.2d 862, 871 (5th Circuit 1975).

effort to comply with the other half of the bargain (parole by the Board)—it can ignore the constitutional question involved and insist that the terms of an international extradition treaty be the sole determining factor.

Initially, as has been pointed out above, the Court does not agree that the Government has, indeed, used its best efforts to forestall petitioner's extradition. Its "best efforts," to be charitable, have been too little, and too late.

It is not without regret for the impact which this decision may have upon our Government's diplomatic relations with a foreign government that I find against the Government in this matter. But simply because departments of the Executive Branch decline to bear an onus which may attach to their obligations of defending rights granted by our Federal Constitution, such acquiescence to diplomacy or legalistic formality cannot justify the Judiciary's following a similar course. The sanctity of the Constitution, and the protections it guarantees, are the foremost considerations here. The "constitutional obligations owing Bauer" recognized by the Fifth Circuit[11] must take precedence over any treaty obligations to a foreign nation. If, as the Opinion of the Fifth Circuit intimates, this result causes Switzerland to feel aggrieved, "its avenues of redress would more likely be through diplomatic means or in international tribunals."[12]

The Government's motion to dismiss the habeas corpus petition is denied. Consequently, petitioner's

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[11] Id., at 870.

[12] Id., at 873.

application for release is granted. It is ordered that the extradition order entered in Cause No. 67-10 be vacated, stricken and held for naught, and that petitioner be released forthwith from any form of detention arising from that proceeding, from her conviction for escape, or from these consolidated proceedings.

APPENDIX F

Petition of Josette GEISSER, Divorced Bauer, a/k/a Paulette Louise Fallai.

Josette Claire BAUER, nee Geisser, a/k/a Paulette Louise Fallai,
Petitioner-Appellee,

v.

UNITED STATES of America,
Respondent-Appellant,

Alfred Keller, Consul General of the Government of Switzerland,
Intervenor-Appellant.

No. 76-3324

United States Court of Appeals,
Fifth Circuit.

June 22, 1977.

Before TUTTLE, WISDOM and COLEMAN, Circuit Judges.

WISDOM, Circuit Judge:

This is the second time this Court has been asked to balance the rights of this petitioner to the plea bargain she made with the United States Government against the obligations of the Government under an extradition treaty with Switzerland. The facts of the case are set out in full in the opinion by Chief Judge Brown issued in the first appeal. *Geisser v. United States*, 5 Cir. 1975, 513 F.2d 862. The petitioner, Josette Claire Bauer, nee Geisser, escaped from a Swiss prison where she was serving a sentence for patricide. On August 31, 1967, she and an accomplice, Willy Lambert, were arrested in

Miami for attempting to smuggle 28 pounds of heroin into this country as part of an international drug smuggling conspiracy. To gain information from them and their assistance to the prosecutor, representatives of the Justice Department and the local United States Attorney's office engaged in plea negotiations. Bauer and Lambert consented to plead guilty to charges carrying lesser sentences in return for divulging their knowledge of the domestic and international drug conspiracy in which they were involved, and to testify against their superiors in the ring. The United States Government agreed to reindict them for lesser offenses, to secure their parole after three years, and to use its best efforts to prevent the extradition of the two to Switzerland or France. The last part of the bargain became necessary to gain the cooperation of Bauer and Lambert because they were "obsessed by their intense fear of reprisals—a fear all the agents concerned accepted as well-founded." *Geisser v. United States*, 513 F.2d at 864. Bauer and Lambert kept their bargain. Indeed Josette Bauer was a particularly valuable witness because of her "remarkably retentive memory." Before the plea bargaining was concluded the Swiss Government sought and obtained, on November 2, 1967, in the Southern District of Florida an order certifying the extraditability of Bauer.

In her habeas corpus petition Josette Bauer seeks to compel the Government to keep its part of the bargain; she asks for specific enforcement of the plea agreement and an injunction against the extradition order. In the initial response to the petition Judge Mehrtens, who also presided over the guilty pleas of Bauer and Lambert, held an extensive hearing. He concluded that the United States Government failed to keep both the

parole and extradition aspects of the bargain. Judge Mehrtens found that there was a definite agreement that Bauer would not serve more than three years in prison and that she would not be deported to France or Switzerland.

In the first appeal in this case the United States Government did not challenge any of the findings of fact of the district court except the part of its decision that found an absolute agreement to prevent extradition to France or Switzerland. The Department of Justice has contended that its commitment to Bauer and Lambert was no more than to use its "best efforts" to prevent Bauer's extradition.

This Court, through Judge Brown, decided that it needed "an authoritative declaration of the position of *the* United States Government—not just that of one or more departments or agencies." *Geisser v. United States*, 513 F.2d at 869. It reasoned:

> we are not at all sure that a Secretary of State who is instructed by the chief legal officer of the nation that failure to keep the bargain is a plain violation of Bauer's constitutional rights would persist in the steps to effectuate extradition. (Footnote omitted.)

Id. The Court rejected the Government's claim that Bauer's habeas corpus action was not ripe and that the district court judgment should be vacated because of the failure to join the Confederation of Switzerland as an indispensable party under Rule 19(a), F.R.Civ.P. Instead the Court vacated the district court's order and remanded the case for further proceedings, if they became necessary:

> Several things are to be accomplished by and on the remand. The Government shall, after considera-

> tion of the promise made and the failure to keep all or part of it by the respective officials at the highest levels, state unequivocally the position of the United States Government. In the event that position does not result in the effectual release of Bauer from the restraints or prospects or threats thereof, the District Court shall conduct further hearings after allowing fullest discovery on all issues and particularly on the question of just what has been done with the promise "to use our best efforts" and the reasons why, if any, steps have not been taken or why they have been ineffectual. (Footnote omitted.)

Geisser v. United States, 513 F.2d at 871-72. Thus, the United States Government was given a second chance to keep its bargain, preferably through diplomatic channels without further judicial action, or to explain why it could not prevent Bauer's extradition if that was the result of its efforts.

On remand Judge Mehrtens again held a hearing on the question of Bauer's extradition.[1] Although not required to do so by this Court, the district judge also permitted the Consul General of Switzerland to intervene in the action. The record in this case contains documentary evidence on the efforts of the Departments of Justice and State to prevent Bauer's extradition to Switzerland or France. The first step was taken by the Department of State in a letter written on October 3, 1975, by Deputy Attorney General Harold

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[1] The petitioner's counsel conceded to Judge Mehrtens that the Government's failure to make a recommendation to the Board of Parole for Bauer's release after three years is moot because she is no longer in prison.

R. Tyler, Jr., to Secretary of State Henry A. Kissinger.[2] The letter described this Court's negative reaction to

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[2] 10/3/75
Honorable Henry A. Kissinger
Secretary of State
Washington, D.C.

Dear Mr. Secretary:

A recent decision of the United States Court of Appeals for the Fifth Circuit requires that we resolve a matter of mutual interest to our Departments.

The Court of Appeals believed the case was properly characterized as one involving "the great United States going back on its word in a plea bargain made by the Department of Justice which assured the Government of vital indispensible evidence leading to conviction of principals in a grand scale international heroin importing conspiracy". The Court refers to an agreement negotiated between this Department and one Josette Geisser Bauer, a Swiss citizen.

In 1964, Josette Bauer escaped from a correctional institution in Bern, Switzerland, where she was confined for patricide. In August 1967, she and a confederate were apprehended in Miami on charges of smuggling heroin into the United States. Because the heroin seizure was decidedly large-scale and because Bauer and her accomplice were mere couriers, this Department entertained a greater intelligence than prosecutorial interest in these individuals. Once we had ascertained that she possessed valuable information, the Department began negotiating a mutually satisfactory agreement with Bauer and her attorney. Subsequently, in November of 1967, Switzerland, on the basis of the incompleted sentence for patricide, obtained a court order certifying that Bauer was subject to extradition. As part of the agreement eventually concluded between Bauer and our representatives, we agreed to use our best efforts to assure that she would not be returned to Switzerland by our Government, despite the existence of this outstanding order of extradition. For her part, Bauer gave cruical testimony in subsequent trials and provided us with intelligence information that was characterized as invaluable by our officials.

In August of 1973, Bauer brought a successful action in the United States District Court for the Southern District of Florida

[footnote continued]

the Justice Department's failure to do anything to keep its bargain with Bauer. Deputy Attorney General Tyler conceded: "The Court of Appeals was correct in finding

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for specific performance of this agreement. The District Court entered an order forever estopping the Government from enforcing the order of extradition outstanding against her. The Court in effect construed the commitment to Bauer as an absolute guarantee that she would not be extradited. Its basis for doing so was her stated recollection of the agreement and the view of our representative that she could have received this impression as the commitment was embellished by representations as to the probable success of our efforts on her behalf as well as assurances that "Washington keeps its deals".

For the primary purpose of asserting Switzerland's interest in these proceedings, the Justice Department appealed the District Court order. However, the Court of Appeals rejected our argument that the order was invalid because Switzerland was an indispensible party to these proceedings affecting her interests and should therefore have been joined. The Court also found it unnecessary to decide whether the commitment to Bauer involved an absolute guarantee that she would not be extradited, apparently believing that her constitutional rights had been violated *by failure of the Government to make any effort* to assure that she was not returned to Switzerland. Thus, the Court expressed the view that foreclosing extradition was in all probability the only remedy available to her at this time.

However, rather than affirming the District Court order of estoppel—which would have been not only a bad precedent but would have involved, as the Court noted, the judiciary "treading upon delicate international relations," the Court of Appeals has remanded the case to the District Court for "an authoritative declaration of the position of the United States Government" as regards its intent with respect to enforcement of the extradition order.

The Court of Appeals has made quite plain its hope that the matter will not have to be resolved by the judiciary. Equally plain is the Court's inclination to uphold, if necessary, the commitment to Bauer, presumably by affirming an order of estoppel on the theory that individual constitutional rights are superior to the Government's treaty obligations. Given the Court's conclusion that a promise was made but not fulfilled, we

[footnote continued]

that we had made no effort to prevent Bauer's return to Switzerland." In addition, he concluded that "all

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find this theory persuasive and, accordingly, request that the outstanding order for Bauer's extradition not be executed.

The Court of Appeals was correct in finding that we had made no effort to prevent Bauer's return to Switzerland. Any impetus to do so was lost when, in October of 1969, she escaped from prison where she was confined pursuant to a sentence received on her guilty plea to reduced charges, which also constituted part of our agreement with her. The Court, however, was receptive to Bauer's position that the escape was effected only because she greatly feared being returned to Switzerland and had been told that the Government, notwithstanding its commitment in this regard, intended to extradite her to Switzerland.

We are not unmindful that Switzerland's interests have been compromised and have taken steps to ensure that a problem of this nature does not recur. Instructions have been issued that any future agreements regarding such matters must be approved in advance by this Department.

However, we must of course deal with the matter in its present posture. We would not wish to countenance a plain violation of Josette Bauer's constitutional rights, and in the circumstances presented, it is our view that all interests would be advanced by a decision not to execute the outstanding extradition order.

We share the hope of the Court of Appeals that this matter will not ultimately have to be resolved by the judiciary, though we have little doubt as to what its resolution will be should it come to that. Therefore, I would be most appreciative of your assistance in resolving this vexing problem which creates difficulties for you in our relationship with Switzerland as well as difficulties for the Department of Justice in its relationship with the judiciary.

We are enclosing for your further consideration a copy of the opinion of the Court of Appeals and will attempt to continue further court proceedings pending our receipt of your advice at your earliest convenience.

Sincerely,
Harold R. Tyler, Jr.
Deputy Attorney General

interests would be advanced by a decision not to execute the outstanding extradition order." On March 19, 1976, Deputy Secretary of State Robert S. Ingersoll responded to the Tyler letter.[3] He stated that the

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March 19, 1976

[The Honorable Harold R. Tyler, Jr.,
Deputy Attorney General]
Dear Mr. Tyler:

Your letter of October 9, 1975, relating to the pending extradition of Josette Geisser Bauer has been carefully reviewed by this Department. We have also carefully examined the Extradition Treaty between the United States and Switzerland signed at Washington May 14, 1900 (31 Stat. 1928) and its two supplements (49 Stat. 3192) and (55 Stat. 1140).

While we understand the difficulty presented by the decisions of the courts in this matter and are sympathetic to your concern, which we share, that this matter affecting international relations will be resolved by the judiciary, the treaty in question does not provide discretionary authority to the Secretary of State to withhold extradition properly requested by the Government of Switzerland. Article I, for example, states that the "Government of the United States of America and the Swiss Federal Council bind themselves mutually to surrender such persons as, being . . . convicted of any of the crimes or offenses enumerated hereinafter in Article II . . . ." Article II states that extradition "shall be granted for the following crimes and offenses . . ." Neither District Judge Clyde Atkins in the 1967 extradition proceeding, nor this Department, have found applicable any of the defenses enumerated in Articles VII, VIII, or IX of the treaty.

Nevertheless, mindful of the commitment made by representatives of the Department of Justice, even though without the authorization or approval of the Department of State, to exert best efforts to assure that Ms. Bauer would not be returned to Switzerland, the Department of State has held discussions with representatives of the Embassy of Switzerland and had two exchanges of notes on this subject. After an initial exchange of notes of October 24 and December 11, 1975 (enclosed), in which the Swiss Government maintained its request and ex-

[footnote continued]

extradition treaty between the United States and the Government of Switzerland provids no discretionary authority for the Secretary of State to withhold extradition. Deputy Secretary of State Ingersoll enumerated the actions taken by the Department as part of the "best efforts" obligation. On October 24, 1975, in a

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pressed the opinion that not granting extradition would violate the obligations of the treaty, a meeting of legal representatives was held on January 13, 1976 (memorandum of conversation enclosed) with an expression of continued strong Swiss interest in the extradition of Ms. Bauer. Finally, a first person note was sent to the Charge d'Affaires of the Embassy of Switzerland urging his government to withdraw its extradition request (enclosed). The response of the new Ambassador, addressed to the Secretary of State and dated March 15, 1976 has just been received (enclosed). For the reasons stated in that note, the Swiss Government continues to maintain its extradition request.

Our repeated attempts at different levels to have the Swiss Government withdraw its extradition request having been unsuccessful, and in the absence of discretion under the treaty, it is my view that the United States Government has made its best efforts to assure that Ms. Bauer will not be returned to Switzerland. I believe the unauthorized assurances of Justice Department representatives can and should require no more.

In this connection, I am pleased to note that your Department has taken steps to ensure that a problem of this nature does not recur. While your letter describes the instructions as being that any future agreements be approved in advance by your Department, I expect that no such approval, directly affecting treaty obligations and the conduct of foreign relations, will be given without the concurrence of the Department of State.

Finally, I note that the Swiss Government throughout has expressed its willingness for its views to be communicated to the court, both through the enclosed documents and through participation in the hearing later this month.

Sincerely,
s/Robert S. Ingersoll
Robert S. Ingersoll

note to the Embassy of Switzerland, the State Department simply requested "the views of the Embassy" on two letters, including the one from Tyler, that had been transmitted to the Department on the Bauer case. In response, the Swiss Embassy wrote on December 11, 1975, that it had decided to continue to maintain its request for Bauer's extradition and enclosed a memorandum on applicable United States law in support of the request. In the memorandum legal counsel to the Embassy concluded that the October 9, 1975, letter of Deputy Attorney General Tyler constituted "best efforts" within the meaning of the agreement with Bauer and that because the bargain had thus been kept, the State Department was obligated by the treaty to assist in Bauer's extradition.

On January 13, 1976, a meeting of representatives from the State Department and the Swiss Embassy was held in connection with the issue of Josette Bauer's extradition. The memorandum of the meeting suggests that much of it was devoted to a discussion of the legal issues in the case. The Swiss also reiterated the country's demand for Bauer's extradition. A note from the Department of State to the Swiss Charge d'Affaires followed the meeting; in it the Department reiterated its suggestion that "it would be in the best interest of both our Governments . . . to terminate the litigation in this case". The Department also voiced its agreement with the Embassy of Switzerland that the extradition of Bauer would be proper under the treaty. The note stated that the "very stringent view" of the Court of Appeals for the Fifth Circuit obligated the United States Government to attempt to prevent her extradition. The Ambassador from Switzerland responded on March 15, 1976: "[I]n order to preserve its important

interests in the administration of justice and its rights under the treaty in question, [the Swiss Confederation] must respectfully maintain its request for Ms. Geisser's extradition."

After considering this evidence the district court concluded:

> [T]he Court does not agree that the Government has, indeed, used its best efforts to forestall petitioner's extradition. Its "best efforts," to be charitable, have been too little, and too late.

This determination was based in part on the court's finding that in the 1975 communications with the Department of State the Justice Department failed to mention the petitioner's "well-founded fears for her life should extradition be effected as a matter of a primary concern to both the United States and Switzerland". The district court granted the petitioner's application for release and vacated the extradition order. The United States and the Consul-General of Switzerland, as an intervenor, appeal that order.

I.

THE BARGAIN AND ITS BREACH

The agreement made by the United States with Bauer had several elements; the extradition issue remains to be resolved. The nature of the bargain with regard to extradition has been characterized in two ways. After the first hearing on Bauer's habeas corpus petition, Judge Mehrtens found that the Justice Department made a definite agreement with Bauer that she would not be deported to Switzerland or France upon her release from prison. On appeal the Government challenged that finding of fact, arguing that the obligation

involved only the Government's promise to use its "best efforts" to prevent Bauer's extradition.

In its first opinion this Court remanded the case to the district court for further hearings on the question of "just what has been done with the promise 'to use our best efforts' ". *Geisser v. United States,* 513 F.2d at 872. Thus the Court concluded that the agreement made by the Government could most accurately be characterized as a promise to use "best efforts" to prevent Bauer's extradition. In conformance with this conclusion Judge Mehrtens evaluated the Government's actions from a "best efforts" perspective and found them inadequate. We agree.

In this Court's first opinion Chief Judge Brown suggested how the Government could comply with its "best efforts" promise to Bauer:

> The best effort would, at a minimum, be a strong presentation to the Department of State as to what had been promised and the likely dangers to the bargainee-defendant-witness.

Geisser v. United States, 513 F.2d at 869. The documentary evidence presented to the district court fails to reveal a "best efforts" performance by the United States Government through the Departments of State and Justice. The letter written by Deputy Attorney General Tyler only obliquely refers to the reason for the nonextradition agreement.[4] In none of the documents is there a "strong presentation" of the likely dangers to Bauer suggested by this Court. Under the "best efforts" bargain the Government obligated itself to serve, in effect, as Bauer's personal advocate on the

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[4] *See* note 2 *supra*, at para. 8.

issue of her extradition. In contrast, the letters are written from the perspective of those concerned not so much about commitments to a client but about a damaging legal precedent. The reasons underlying the original bargain, Bauer's admirable performance in keeping her part of the agreement, her "intense fear of reprisals", and the conclusion of Government agents on the case that her fears were well-founded were never presented to the State Department by the Department of Justice nor by the former to the Swiss Confederation.

The Department of Justice conceded at oral argument that Deputy Attorney General Tyler's letter to Secretary of State Kissinger did not contain a representation that Bauer feared for her life on extradition to Switzerland and that some Justice Department staff members had concluded at the time of the bargain that her fears were well-founded. The Department nevertheless contends that such an omission is irrelevant because the Swiss Embassy was aware of such concerns and concluded they were unrealistic. We do not agree. The "best efforts" bargain requires that the Government advocate Bauer's case for nonextradition to Switzerland and France in the most effective terms possible. Her intense fear for her life was the predicate for the bargain, and the Government's failure to explain fully and strongly this part of the agreement reduced its advocacy of her cause almost to an empty gesture.

In *Santobello v. New York*, 1971, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427, the Supreme Court held that the petitioner's constitutional rights had been violated when the prosecutor failed to keep its bargain to make no sentence recommendation. The Court reached this result even though the judge stated at

sentencing that he was "not at all influenced" by the district attorney's recommendation.

> We need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration.

404 U.S. at 262-63, 92 S.Ct. at 499. The same reasoning applies here. The Government promised to use its "best efforts" to prevent Bauer's extradition, and this Court determined that the commitment at a minimum requires a "strong presentation" of what was promised and of the likely dangers to the bargainee. The Government failed to make such a presentation. That the Swiss may to some extent be aware of her fears does not relieve the Government of the obligation to make the strongest case possible for the nonextradition of Bauer to Switzerland and France. As the Supreme Court stated in *Santobello*: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262, 92 S.Ct. at 499.

The First Circuit has suggested the proper focus in this situation:

> We must lastly observe, because of the government's argument here, that a prosecutorial failure to fulfill a promise or to make a proper promise is

> not rendered harmless because of judicial refusal to follow the recommendation or judicial awareness of the impropriety.... [I]t is the defendant's rights which are being violated when the agreement is broken or meaningless. It is his waiver which must be voluntary and knowing.

Correale v. United States, 1 Cir. 1973, 479 F.2d 944, 949. Similarly, the reaction of the Swiss is irrelevant to the Government's obligation to keep its agreement. Our focus here must be on the nature of the promise made to Bauer. A plea bargain is contractual in nature; and when the prosecution breaches the agreement, the entire legal basis for the plea fails. *See United States v. Bridgemen*, 1975, 173 U.S. App. D.C. 150, 523 F.2d 1099, 1109-10, *cert. denied*, 425 U.S. 961, 96 S.Ct. 1743, 48 L.Ed.2d 206; *United States v. Gorham*, 1975, 173 U.S. App.D.C. 139, 523 F.2d 1088, 1097. Because a guilty plea involves a waiver of constitutional rights, *McCarthy v. United States*, 1969, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418, it must be made voluntarily. The Supreme Court established the standard for voluntariness in *Brady v. United States*, 1970, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747, by quoting a passage from a dissenting opinion by Judge Elbert Tuttle:[5]

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless

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[5] *Shelton v. United States*, 1957, 242 F.2d 101, 115 (Tuttle, J., dissenting), *approved en banc*, 5 Cir., 246 F.2d 571, 572 n. 2, rev'd on *confession of error on other grounds*, 1958, 356 U.S. 26, 78 S.Ct. 563, 2 L.Ed.2d 579.

> induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises) or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

397 U.S. at 755, 90 S.Ct. at 1472. Here a promise remains unfulfilled, and the plea is therefore involuntary unless the breach is remedied. "It is axiomatic [under *Santobello*] that no guilty plea that has been induced by an unkept plea bargain can be permitted to stand." *Dugan v. United States*, 5 Cir. 1973, 521 F.2d 231; *United States v. Pihakis*, 5 Cir. 1977, 545 F.2d 973; *Scrivens v. Henderson*, 5 Cir. 1976, 525 F.2d 1263, *cert. denied*, 429 U.S. 919, 97 S.Ct. 311, 50 L.Ed.2d 285.

As the foregoing discussion suggests, the district court's finding that the Government failed to use its "best efforts" to forestall the petitioner's extradition is not clearly erroneous. Fed.R.Civ.P. 52(a). We reject the Department of Justice's contention that the clearly erroneous standard is inapplicable to review a record confined to documentary evidence. The rule in this Circuit is clear and has been reiterated many times:

> The appellant's burden, under Fed.R.Civ.P. 52(a), of showing that the trial judge's findings of fact are 'clearly erroneous' is not as heavy . . . as it would be if the case had turned on the credibility of witnesses appearing before the trial judge. . . . However, regardless of the documentary nature of the evidence and the process of drawing inferences from undisputed facts, the reviewing court must apply the 'clearly erroneous' test. (Footnote omitted.)

Sicula Oceanica, S. A. v. Wilmar Marine Eng. & Sales Corp., 5 Cir. 1969, 413 F.2d 1332, 1333-34. *See Volkswagen of America, Inc. v. Jahre*, 5 Cir. 1973, 472 F.2d 557, 559; *Burston v. Caldwell*, 5 Cir. 1975, 506 F.2d 24, 26-27, *cert. denied*, 421 U.S. 990, 95 S.Ct. 1995, 44 L.Ed.2d 480. Under the clearly erroneous test the district court's finding of a breach of the plea bargain by the Government must stand.[6]

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[6]In this appeal the appellant, Department of Justice, and the intervenor appellant, Consul General of the Government of Switzerland, raise several issues that have not been previously contested in this case. The Swiss Confederation argues that the nonextradition promise was not part of the original plea bargain and therefore that Bauer waived no constitutional rights in reliance on it. The Department of Justice makes a similar claim, that the "best efforts" representation was not an integral part of the plea bargain. In addition, the intervenor contends that Bauer materially breached the plea bargain by escaping from prison and thus has no right to enforcement of the agreement. After the first hearing in this case, Judge Mehrtens found that the Government's nonextradition agreement was an integral part of the plea bargain. In the initial appeal Chief Judge Brown specifically noted in his opinion that "the Government does not challenge the findings of fact of the District Court" *Geisser v. United States*, 513 F.2d at 868. On remand the district court was charged with determining how the Government would keep its bargain. *Id.* at 871-72. Thus, the Department of Justice and the Swiss Consul General are challenging a factual finding made in the first habeas corpus hearing and not subsequently contested. The Government is bound by its decision not to challenge the finding of the district court that the nonextradition agreement was an integral part of the plea bargain. In addition, an intervenor must accept the proceedings as he finds them. The Swiss Consul General intervened after the district court's factual findings as to the nature of the agreement were made and accepted by this Court on appeal, with one modification. The intervening Swiss Confederation has no right to relitigate the issues. *Johnson v. Middleton*, 7 Cir. 1949, 175 F.2d 535; *Hartley Pen Co. v. Lindy Pen Co.*, S.D.Cal.1954, 16 F.R.D. 141, 153.

[footnote continued]

II.

REMEDY

When a plea bargain is breached, the courts must fashion a remedy that insures the petitioner "what is reasonably due in the circumstances". *Santobello v. New York*, 404 U.S. at 262, 92 S.Ct. at 499. *See also United States v. I. H. Hammerman, II*, 4 Cir. 1975, 528 F.2d 326, 332. And what is reasonably due "will vary". *Correale v. United States*, 1 Cir. 1973, 479 F.2d 944, 950. Generally, the bargain is "either specifically enforceable between the *parties to the agreement* or the plea is void" (emphasis in original). *Gallejos v. United States*, 5 Cir. 1972, 466 F.2d 740, 741. In *Santobello* the Supreme Court discussed possible remedies:

> The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, *i.e.*, the opportunity to withdraw his plea of guilty. (Footnote omitted.)

404 U.S. at 263, 92 S.Ct. at 499. The alternative involving withdrawal of the guilty plea and resentencing before a different judge was available in *Santobello*

See 3B Moore's Federal Practice ¶24.16[1] and n. 8 (1977). We therefore reject arguments that challenge the determination that in pleading guilty Bauer waived her constitutional right to a fair trial in reliance on the Government's promise to use its "best efforts" to prevent her extradition to France and Switzerland.

because the petitioner had been released on bail pending appeal and had not yet begun to serve his sentence. "The court therefore had no reason to consider other possible means of providing specific enforcement." *Correale v. United States*, 1 Cir. 1973, 479 F.2d 944, 950.

Chief Judge Brown discussed the remedies available in this case in his opinion in the first appeal:

> [T]he avenues of redress available for Bauer are few. Eradicating the impact of her testimony is impossible. And, of course, an opportunity to replead seems superficial and unrealistic in view of her long confinement. Specific performance may well be the only way out to keep the bargain.

Geisser v. United States, 513 F.2d at 871. The district court's remedy gives decisive weight to Bauer's fears for her life on extradition to Switzerland or France; it vacated the outstanding extradition order against Bauer. We decline to go that far at this juncture. We conclude that a narrowly drawn remedy specifically enforcing the Government's "best efforts" agreement is required. The Government must again try to prevent Bauer's extradition to Switzerland or France. We are not convinced that the vast powers of persuasion at the command of the Departments of Justice and State have been adequately applied to Bauer's cause. The bargain she made with the United States Government in entering her guilty plea and waiving her constitutional rights requires no less.

While retaining jurisdiction, we remand the case to the district court if, in the discretion of that court, further proceedings are necessary or appropriate. The Government has a reasonable time in which to use its "best efforts" to prevent the extradition of Bauer to Switzerland or France. Enforcement of the extradition

order outstanding against Bauer must of course be held in abeyance until this case has been resolved.

III.

DISQUALIFICATION OF DISTRICT JUDGE

The intervenor-appellant, the Consul General of Switzerland, contends that Judge Mehrtens, as a material witness to disputed facts concerning the plea bargain in this case, had an obligation to disqualify himself under 28 U.S.C. §455 (1970).[7] According to the Swiss representative, at the time Judge Mehrtens presided over Bauer's guilty plea he became aware of the elements of the bargain put into dispute by her habeas corpus petition and therefore is a material witness to those facts. The appellee, Bauer, responds that Switzerland intervened at the time of the second hearing when the only issue before Judge Mehrtens was whether the Government had used its "best efforts" to keep its bargain with Bauer.[8] At that point in the case the district court's independent knowledge of the elements of the bargain was not at issue. The Swiss Consul General's response in its reply brief is that Judge Mehrtens has a continuing obligation to disqualify himself.

The Fourth Circuit in *United States v. Smith*, 4 Cir. 1964, 337 F.2d 49, *cert. denied*, 1965, 381 U.S. 916,

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[7] 28 U.S.C. §455 (1970), 62 Stat. 908, before its amendment, provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he . . . is or has been a material witness . . . .

[8] *See* note 6 supra.

85 S.Ct. 1542, 14 L.Ed.2d 436, rendered a thoughtful opinion analyzing the relationship between section 455 and 28 U.S.C. § 2255 (1970), authorizing habeas corpus petitions by federal prisoners. The court concluded:

> It would be anomalous, indeed, having determined that the purpose of section 2255 was to permit the trial judge, because of his familiarity with the proceedings and ability to supplement the record, to pass upon motions thereunder, now to ascribe to Congress the intention to disqualify any judge possessing that familiarity with the proceedings from passing upon the motion. We are of the opinion that sections 2255 and 455 of Title 28 should be construed together. So construed, it is apparent that the district judge here was not a material witness within the meaning of the latter section.

337 F.2d at 53. In line with the position taken by most of the other circuits, *McKinney v. United States*, 9 Cir. 1973, 487 F.2d 948, 949-50; *Hoffa v. United States*, 6 Cir. 1973, 471 F.2d 391, 394, *cert. denied*, 414 U.S. 880, 94 S.Ct. 159, 38 L.Ed.2d 125; *Mirra v. United States*, 2 Cir. 1967, 379 F.2d 782, 788, *cert. denied*, 389 U.S. 1022, 88 S.Ct. 593, 19 L.Ed.2d 677, we adopt the *Smith* court's reasoning and reject the intervenor's contention that Judge Mehrtens has an obligation to disqualify himself as a material witness.

VACATED AND REMANDED.

COLEMAN, Circuit Judge, concurring in part and dissenting in part.

I agree that Judge Mehrtens was not disqualified.

I agree with what is said in the remainder of the majority opinion, but I cannot concur in it, because it

does not reach what I believe to be the fundamental issues in the case.

I

Article VI of the Constitution commands that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land".

For seventy seven years the United States has had an extradition treaty with the Swiss Confederation, ratified by the Senate. Nobody contends that this treaty in any manner violates the Constitution itself.

I therefore take the position that the obligations of the Treaty cannot be bargained away by any federal prosecutor, however sincere the effort. Being a part of the supreme law, binding on every officer of the United States, the treaty terms could not be modified or diminished by a plea bargain in a court which had no authority to amend or abrogate the Treaty. Consequently, that part of the plea bargain which attempted to commit the United States to any course of action inconsistent with the Treaty violated the Constitution. I respectfully suggest that it is void and entitled to no notice by the courts.

Moreover, before this putative plea bargain was made, the Swiss government had filed in [sic] extradition complaint against Mrs. Geisser in federal district court. A hearing was held, in which she was present, along with counsel. The court announced its order that she would be extradited to Switzerland when the criminal case against her was completed and any sentence imposed was served. Consequently, she could not have been misled or overreached in the matter of her actual status. She was simply clutching at any possible straw to avoid

returning to a Swiss prison. Thus far, she has been successful.

II

In *Santobello* the plea bargaining was concerned with the sentence which was to follow a guilty plea. The prosecutor had agreed that he would make no recommendation on that subject. A subsequent prosecutor, unaware of the agreement, breached it. The Supreme Court held that the agreement had to be kept. The point is that the Court was considering only the sentencing process. It was not concerned with an agreement to take action on subjects outside the normal function or jurisdiction of the court in which the pledge was made.

In my opinion, that part of plea bargains freighted with promises outside the sentencing process and beyond the jurisdiction of the Court should neither be allowed nor enforced. Most assuredly this should be true as to subjects over which the Department of Justice has no jurisdiction, more especially where the defendant has not been misled by representations of the prosecutor.

As I understand this record, the purported agreement was made not to obtain a guilty plea but to get the fugitive to testify against some of her confederates. The defendant was clutching at straws but, so far, the straws have been more effective than a solemn treaty of the United States, a result which I cannot countenance.

III

Lastly, I am of the view that if the promise is enforceable, the Department has shown reasonable com-

pliance with its agreement. Its efforts are set forth in the majority opinion. I think they were enough. It was never thought that the Department could do any more than "ask", and ask it did. The Swiss government declined to relent, whereupon the duty of the Secretary of State, under the Treaty, is beyond dispute. This defendant's record demonstrates that she is more than able to take care of herself. Not only did she escape from a Swiss prison but she also escaped from federal custody and it was nearly three years after the federal escape before she was caught. So far as I know there has been no hearing nor any findings of fact as to any danger she might be subject to in a Swiss prison, if indeed one can be found which would hold her. On her unsupported assertions of fear, the rights we have guaranteed the Swiss are further delayed, if not altogether thwarted.

Our concern for Constitutional guaranties should never falter, but, with deference, I feel very strongly that our concern for Mrs. Geisser is seriously misplaced. I would enter an order directing immediate compliance with the Treaty.

I respectfully dissent.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-772-Civ-WM
No. 73-773-Civ-WM

IN THE MATTER OF THE PETITION OF
JOSETTE GEISSER, DIVORCED BAUER,
a/k/a PAULETTE LOUISE FALLAI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

ALFRED KELLER, CONSUL GENERAL OF THE
GOVERNMENT OF SWITZERLAND,
Intervenor.

ORDER

This matter is before the Court upon the Motion To Discharge Petitioner, the Intervenor's Response To Petitioner's Motion To Discharge Petitioner, as well as the pending Motions to Dismiss the Petition for Writ of Habeas Corpus filed by the United States and the Intervenor. The Court being fully informed and advised, Finds as follows:

1. That the Fifth Circuit Court of Appeals remanded this case on August 9, 1977, in order to permit the United States Government a reasonable period of time "to use its 'best efforts' to prevent the extradition of Bauer".

2. That this Court on September 9, 1977, adopted the Fifth Circuit opinion.

3. That the subsequent nominal efforts by the United States Government on behalf of the petitioner to prevent her extradition are wholly inadequate to fulfill their obligation "to serve, in effect, as Bauer's personal advocate on the issue of her extradition". see, *Petition of Geisser*, 554 F2d 698, 703 (5th Cir., 1977).

4. That the United States Government has failed to use its 'best efforts' to prevent the extradition of petitioner as directed by the Court of Appeals.

5. That as outlined in the motion of petitioner and accompanying affidavit, the only moving force since the mandate of the Court of Appeals has been the petitioner.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the extradition order entered in Cause No. 67-10 be vacated, stricken and held for naught and that petitioner be released forthwith from any form of detention arising from any form of detention arising from these consolidated proceedings.

IT IS FURTHER ORDERED and ADJUDGED that petitioner be and she is hereby released and discharged from any order relating to extradition and that she is free to continue to reside in the United States of America.

DONE AND ORDERED this 2nd day of October, 1979, Miami Fl.

s/W. O. Mehrtens
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 19

No. 79-3869

D.C. Docket Nos. 73-772-Civ-WM &
73-773-Civ-WM

**In the Matter of the Petition of
Josette GEISSER, Divorced Bauer,
a/k/a Paulette Louise Fallai.**

**Josette Clair Bauer, Nee Geisser,
a/k/a Paulette Louise Fallai,
Petitioner-Appellee,**

v.

**UNITED STATES of America,
Respondent-Appellant,**

**Hector Graber, Consul General of the
Government of Switzerland,
Intervenor-Appellant.**

Appeals from the United States District Court for the Southern District of Florida

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of

the District Court appealed from, in this cause be, and the same is hereby, vacated; and judgment rendered for the United States of America, defendant, and Hector Graber, Consul General of Switzerland, defendant-intervenor.

October 10, 1980

Issued As Mandate: Nov. 14, 1980.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3869

IN THE MATTER OF THE PETITION OF
JOSETTE GEISSER,
DIVORCED BAUER, a/k/a
PAULETTE LOUISE FALLAI,

JOSETTE CLAIR BAUER, NEE GEISSER,
a/k/a PAULETTE LOUISE FALLAI,
Petitioner-Appellee,

versus

UNITED STATES OF AMERICA,
Respondent-Appellant,

HECTOR GRABER, CONSUL GENERAL OF
THE GOVERNMENT OF SWITZERLAND,
Intervenor-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(Opinion 10/10/80, 5 Cir., 198__, ____ F.2d ____)
(NOVEMBER 6, 1980)

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

APPENDIX J

Fifth Amendment to the United States Constitution:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX K

Treaty between the United States and Switzerland for the extradition of criminals. Signed at Washington May 14, 1900; ratifictation with amendments advised by the Senate June 5, 1900; ratified by the President February 25, 1901; ratified by Switzerland January 21, 1901; ratifications exchanged at Washington February 27, 1901; proclaimed February 28, 1901.

By the President of the United States
of America.

A PROCLAMATION

Whereas a Convention between the United States of America and the Swiss Confederation providing for the extradition of criminals was concluded and signed by their respective Plenipotentiaries at Washington on the 14th day of May, one thousand nine hundred, the original of which Convention, being in the English and French languages is, as amended by the Senate of the United States, word for word as follows:

The Government of the United States of America and the Federal Council of the Swiss Confederation, with a view to the better administration of justice, have resolved to conclude a new Convention for the extradition of fugitive criminals, and, for that purpose, have appointed as their Plenipotentiaries, to wit:

The President of the United States of America: John Hay, Secretary of State of the United States; the Federal Council of the Swiss Confederation: J. B. Pioda, Envoy Extraordinary and Minister Plenipotentiary of Switzerland to the United States; Who, after communicating to each other their full powers, which were

found in good and due form, have agreed upon the following Articles:

ARTICLE I.

The Government of the United States of America and the Swiss Federal Council bind themselves mutually to surrender such persons as, being charged with or convicted of any of the crimes or offenses enumerated hereinafter in Article II, committed in the territory of one of the contracting States, shall be found in the territory of the other State: Provided that this shall be done by the United States only upon such evidence of criminality as, according to the laws of the place where the fugitive or person shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed. In Switzerland, the surrender shall be made in accordance with the laws in force in that country at the time of the demand.

Neither of the two Governments, however, shall be required to surrender its own citizens.

ARTICLE II.

Extradition shall be granted for the following crimes and offenses, provided they are punishable both under the laws of the place of refuge and under those of the State making the requisition, to wit:

1. Murder, including assassination, parricide, infanticide and poisoning; voluntary manslaughter.

2. Arson.

3. Robbery; burglary; housebreaking or shop-breaking.

4. The counterfeiting or forgery of public or private instruments; the fraudulent use of counterfeited or forged instruments.

5. The forgery, counterfeiting or alteration of coin, paper-money, public bonds and coupons thereof, bank notes, obligations, or other certificates or instruments of credit, the emission or circulation of such instruments of credit, with fraudulent intent; the counterfeiting or forgery of public seals, stamps or marks, or the fraudulent use of such counterfeited or forged articles.

6. Embezzlement by public officials, or by other persons, to the prejudice of their employers; larceny; obtaining money or other property by false pretences; receiving money, valuable securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained. The amount of money or the value of the property obtained or received by means of such criminal acts, must exceed 1000 francs.

7. Fraud or breach of trust, committed by a fiduciary, attorney, banker, administrator of the estate of a third party, or by the president, a member or an officer of a corporation or association, when the loss involved exceeds 1000 francs.

8. Perjury; subornation of perjury.

9. Abduction; rape; kidnapping of minors; bigamy; abortion.

10. Wilful and unlawful destruction or obstruction of railroads, endangering human life.

11. Piracy; wilful acts causing the loss or destruction of a vessel.

ARTICLE III.

Extradition shall likewise be granted for an attempt to commit, or participation in, any of the crimes and offenses enumerated in Article II, provided such at-

tempt or participation is punishable in the United States as a felony, and in Switzerland with death, or confinement in a penitentiary or workhouse.

ARTICLE IV.

No extradited person shall be tried by a Special Court.

ARTICLE V.

Demands for the extradition of fugitive criminals shall be made by the diplomatic representative, or, in his absence, by one of the consular agents of the State making the requisition.

When the person whose extradition is asked has been *sentenced* for the offense which occasioned the demand for extradition, such demand shall be accompanied by a certified copy of the sentence pronounced; if the person demanded is merely *charged* with an offense, the demand shall be accompanied by a duly certified copy of the warrant of arrest issued by the competent magistrate of the country in which the offense was committed, and by certified copies of the depositions or other evidence upon the basis of which the warrant was issued. These documents shall contain an accurate statement of the offense charged, of the place where and the time when it was committed. They shall be accompanied by a certified copy of the provisions of law applicable to the offenses charged, as shown by statute or judicial decision, and by the evidence necessary to establish the identity of the person demanded.

The extradition procedure shall be governed by the regulations in force at the time of the demand, in the State upon which the demand is made.

ARTICLE VI.

When it is desired to procure the arrest of a fugitive, by telegraph or otherwise, before the regular papers have been presented, the procedure in the United States shall be to apply to a Judge or Magistrate authorized to issue warrants of arrest in extradition cases, and to present a complaint on oath, as provided by the laws of the United States.

To procure the provisional arrest of a fugitive in Switzerland, the diplomatic representative or a consular agent of the United States shall apply to the President of the Confederation who will order the necessary steps to be taken.

The provisional detention of a fugitive shall cease, and the person arrested shall be released, if a formal demand for extradition, accompanied by the necessary papers, is not presented, in the manner provided in the present Treaty, within two months after the day of arrest.

ARTICLE VII.

Extradition shall not be granted for political crimes or offenses. No person surrendered under the present Treaty, for a common crime, shall be prosecuted or punished for a political offense committed before his extradition.

If the question arises in a particular case, whether the offense committed is or is not of a political character, the Authorities of the State upon which the demand is made shall decide.

ARTICLE VIII.

Extradition shall not be granted when, under the laws of the State upon which the requisition is made, or under those of the State making the requisition, the criminal prosecution or penalty imposed is barred by limitation.

ARTICLE IX.

No person surrendered by either of the Contracting States to the other shall be prosecuted or punished for any offense committed before the demand for extradition, other than that for which the extradition is granted, unless he expressly consents to it in open Court, which consent shall be entered upon the record, or unless, having been at liberty during one month after his final release to leave the territory of the State making the demand, he has failed to make use of such liberty.

The State to which a person has been surrendered shall not surrender him to a third State, unless the provisions contained in the first paragraph of the present Article have been fulfilled.

ARTICLE X.

When the person whose extradition is demanded is prosecuted, or has been convicted, in the State of refuge, for another offense, the extradition may be postponed until the close of the criminal prosecution or the expiration of the penalty.

ARTICLE XI.

If the extradition of the person demanded by either of the two Contracting States is likewise demanded by

one or more other States, for offenses committed by the said person in their territory, preference shall be given to the State whose requisition is based upon the most serious offense, unless the State upon which the requisition is made is bound by Treaty to give preference to another.

If the offenses are of equal gravity, the demand first presented shall have preference, unless the State upon which the requisition is made is bound by Treaty to give preference to another State.

ARTICLE XII.

All articles seized which are in the possession of the person demanded, at the time of his arrest, shall, at the time of the extradition be delivered up with his person, and such delivery shall extend, not only to articles acquired by means of the offense with which the accused is charged, but to all other articles that may serve to prove the offense.

The rights of third parties to the articles in question shall, however, be duly respected.

ARTICLE XIII.

The expenses incurred in the arrest, detention, examination and surrender of the fugitive shall be borne by the State making the demand. The State making the demand shall not, however, be charged for the services of such officials of the Government upon which the demand is made, as receive a fixed salary; for the services of officials receiving only fees, no higher fees shall be charged than those to which such officials are entitled under the laws of the country for services rendered in ordinary criminal cases.

ARTICLE XIV.

The present Treaty shall go into effect thirty days after the exchange of ratifications. This Treaty repeals Articles XIII, XIV, XV, XVI and XVII of the Treaty of November 25, 1850, between the Swiss Confederation and the United States of America; and the provisions in those Articles shall henceforward apply only to demands for extradition pending at the time when the present Treaty goes into effect.

The ratifications shall be exchanged at Washington as soon as possible. After the denunciation of this Treaty by either of the Contracting Governments, the Treaty shall still remain in force for six months after the day of the denunciation.

In witness whereof, the respective Plenipotentiaries have signed the foregoing Articles, and have affixed their seals.

Done in duplicate at Washington, in the English and French languages, the 14th day of May 1900.

JOHN HAY [SEAL.]
J. B. PIODA [SEAL.]

And whereas the said Convention as amended by the Senate of the United States has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Washington, on the 27th day of February, one thousand nine hundred and one:

Now therefore, be it known that I, William McKinley, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof, as amended, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington, this twenty-eighth day of February in the year of Our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

[SEAL.] WILLIAM McKINLEY

By the President:

JOHN HAY

Secretary of State.

[French language omitted.]

APPENDIX L

18 U.S.C. § 3184:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

18 U.S.C. § 3186:

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

Federal Rule of Civil Procedure 52(a):

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION.

No. 67 1010–CIVIL–CA

ERICH MESSMER,
Consul General of the
Confederation of Switzerland,
Plaintiff,

vs.

JOSETTE GEISSER,
divorced Bauer,
a/k/a Paulette-Louise Fallai,
Defendant.

ORDER

THIS CAUSE came on for hearing upon the Plaintiff's Complaint for Extradition, and the Court, after hearing evidence and argument of counsel, finds such evidence to be sufficient to sustain the charges, to wit:

That the Defendant was sentenced on October 13, 1961, by the Court of the Assizes of Geneva, Switzerland, to eight years of confinement in the penitentiary for having on the night of the 8th to the 9th of October, 1957, at Geneva, Switzerland, together with her then husband, Richard Bauer, intentionally killed her father, Leo Geisser; and that, while serving said sentence, she escaped on September 13, 1964, from the Women's Hospital in Berne, Switzerland, leaving a balance of two years, six months and twenty-one days still to be served.

And the Court further finds that murder constitutes a crime which entitles the Plaintiff to request the surrender of the Defendant, according to the stipulations of the Treaty of Extradition, concluded between the United States of America and the Republic of Switzerland on May 16, 1900 (31 US Statutes 1928);

and same is herewith certified to the Secretary of State to the effect that a Warrant may issue upon the requisition of the proper authorities of the Swiss Government for the surrender of the Defendant, according to the stipulations of said Treaty, after the criminal case pending against the Defendant in the U.S. District Court for the Southern District of Florida, Miami Division, is completed, and a sentence, if imposed, has been served;

and it is herewith ORDERED:

That the Arrest Warrant, issued in this cause on October 4, 1967, remain in full force until surrender of the Defendant to the Swiss Government.

DONE AND ORDERED in Chambers, at Miami, County of Dade, State of Florida, this 21 day of November 1967.

s/C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

APPROVED as to Form only:

JAMES JAY HOGAN
Attorney for the Defendant

APPENDIX N

EXCERPTS FROM EVIDENCE BEFORE HON. W. O. MEHRTENS AT 8/8/73 HEARING:

Letter from William G. Earle to William C. Marchiondo:

We also mentioned that if they cooperated, we would do everything possible to see that they would be deported to a country other than Switzerland. We did discuss specific countries, no guarantees were given, but at a later time I did discuss with Willy Lambert and Josette Bauer the possibility of their being deported to South America. . . .

. . . .

I did state to Mr. Hogan and to Bauer and Lambert on every occasion that we discussed the deportation that we would do everything possible to see that they were deported to a country other than Switzerland. I met with Bauer and Lambert many times between 1967 and 1969, and on almost every occasion that we met the subject of their deportation to a country other than Switzerland was discussed. I always told them that the Department of State could throw a wrench into this, but I didn't think that they would in light of the fact that the Swiss Government had not given us any cooperation when we needed it in this investigation. . . . [I]t was this failure to cooperate that gave all of us in the Department of Justice the feeling that the Department of State would surely go along with the deal that we were making to deport them to some country other than Switzerland, if at all possible.

. . . .

. . . I do have the abiding feeling that Lambert and Bauer were entitled to believe that the United States Government would make every possible effort to see

that they were deported to a country other than Switzerland.

. . . They understood, however, that it was not an ironclad promise that we would extradite them to a country other than Switzerland. They did understand that our promise was to use our very best efforts to extradite them to someplace other than Switzerland.

Letter from Alan Yarborough [Customs Agent] to Mr. Marchiondo:

Assurance was given them at all times, that in the negotiating sessions with the attorney, that every effort would be made to have them deported to a country other than that to which they had originally come from and their home country of Switzerland. Again, I must say that I was not present during any of the negotiating or the plea bargaining, however although I was not present, there was never any doubt in my mind that the agreement between the United States Government, principally that of the United States Attorney's Office and the Department of Justice, thatefforts [sic] were being made to assure them that and that they should not have fear to testify in as much as all efforts were being made to send them to some other country, other than the return back to Switzerland. . . . I was always under the impression that every effort was being made,and[sic] they were being led to believe, as well as I was being led to believe, that there was very little if any doubt, as to the fact that they would in fact go somewhere other than Switzerland. . . .

. . . [T]here was little if any doubt at all, that the United States Government would not let these two individuals be deported other than back to Switzerland. And it was explained to them as it was to me, they had

every right and assurance that they would not be later sent back to Switzerland, and that the United States Governement [sic] would fully and totally live up to the original plea bargaining arrangements and agreements that had been negoitated betwee [sic] the Department of Justice and the defense counsel.

Testimony of Josette Claire Bauer:

Q Would you state to the Court any conversations that you had personally with Michael Osman or William Earle or any other Federal employee concerning any sentence or any plea that you yourself were going to make or did, in fact, make?

A After my arrest, after some time, like months after my arrest, I agreed to make a plea bargain with the Government, and they agreed to give me a sentence and promised that I would be protected and not deported back, but I would have to testify against somebody in here. . . .

. . . .

A . . . Mr. Osman told me not to worry [about testifying against Mr. Mori], because the United States Government protects its witnesses. . . .

. . . .

Q Mrs. Bauer, you stated in your direct testimony that it was told to you that this extradition matter was a formality?

A Yes, sir.

Q Who told you that?

A Mr. Hogan at the time, and I hadn't had personal direct contact and conversation on narcotics extensively with Mr. Osman and Mr. Earle at the time. That came after my trial. The Government assured me through the

trial that they would hold their word, because I was worried. There wasn't any signature or nothing, but I was assured that when the U.S. Government makes you a promise, they keep it. And when I got my seven-year sentence—

Q And Mr. Osman made a promise to you that you would be deported to some country other than Switzerland, is that correct?

A Mr. Osman said that I would be protected; that he would give me examples of people who have been re-located with other papers, people that testified for the Government in other matters. So for me, there wasn't any question. I knew I wouldn't be sent back to Switzerland. I couldn't know where I would be sent or where I would go, but I knew I would be protected by the United States Government.

Q But prior to your entry of your plea of guilty to the charges in this case, you had some discussions with Mr. Osman, is that correct?

A Not specific discussions about names and dates. It was interrogation of my knowledge in narcotics.

Q Let's get this clear, Mrs. Bauer.

I'm asking you concerning the promise, if any, to deport you to some other country than Switzerland. You had some discussion with Mr. Osman prior to your plea of guilty concerning that matter?

A Yes, sir.

Q Did he promise to you then, prior to your entry of the plea of guilty, that after you served whatever time you were serving in this case you would be deported to some country other than Switzerland?

A Deported? That I wouldn't be deported to Switzerland.

Q He promised you you wouldn't be deported to Switzerland?

A Yes.

Q This was prior to the entry of your plea of guilty to this charge?

A Yes, sir.

Q Was anybody else present during this promise?

A There were people present at all times. Mr. Earle told us at the time that Washington kept its promises. Now we were upset. And if they wouldn't keep it, he would make a personal appeal to Washington to make sure that it would be observed. There was no doubt in my mind and in everybody's mind that promises are kept. And when I got the seven years, there was no doubt in my mind, either.

Q Mr. Earle, then, took part in making that promise to you, is that correct?

A Yes.

Q Prior to the entry of your plea of guilty to this charge?

A Yes, sir, that's correct.

Q Is it possible that this promise, so-called, did not occur until subsequently when Mr. Mori was arrested?

A That promise was reinforced when Mr. Mori was arrested.

Testimony of James Jay Hogan:

A . . .

. . . .

Now, there was not absolutely a 100 percent deal that she would not be deported to Switzerland, as far

as I remember. But, here was the thing: We made a deal, number one, that they would get a new indictment and they would plead and they would get seven years and they would get an "a" sentence, which, of course, allows them to have parole at any time; that they would serve a maximum of three years. It didn't mean that they had to serve the three years, but they would serve a maximum of three years. And that the Government would do everything in their power, the Department of Justice would do everything in their power to make sure that she didn't go to Switzerland or France and that Lambert didn't go to Switzerland or France.

Now, as I recall, they could not say, 'We won't deport her to Switzerland,' because they didn't have the power. That was the State Department at that time, but they said, 'We'll do everything we can.'

Testimony of William G. Earle:

A . . .

. . . .

. . . And the deal, although it has been six years—my recollection basically of the deal with regard to deportation was that we would use our best efforts to get them to a country other than Switzerland. . . .

. . . .

At that time, I believe their understanding of the deal became a little more clear in their mind that we hadn't promised to deport them to a country other than Switzerland. That is not my recollection: That we absolutely promised. But I do believe that they could operate under that assumption. The reason I say that is we said that Washington keeps its deals.

I heard Mrs. Bauer testify this morning. I specifically remember telling her that. I remember telling her that I would go to Washington to make the Government keep its promise or do everything in my power to have the Government keep this deal, because Washington kept its deal and I thought my word was at stake. So I assured them at that time that we would use every effort that we had to get them to a country other than Switzerland.

Testimony of Michael Osman:

A . . .

. . . .

My best recollection, Your Honor, is that there were no such discussions regarding Mrs. Bauer, and the reason that there were no such discussions is because in November, 1967, Judge Atkins had specifically entered an order requiring her to be extradited or to be deported back to Switzerland. . . .

. . . .

Q Are you aware of any broken promise on the part of the Government as to the place where Josette Bauer would be sent?

A No, I'm not.

Q Are you aware of any commitment to Mrs. Bauer that she would not be deported to Switzerland?

A No, I am not.

No. 80-1316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSETTE CLAIR BAUER, NEE GEISSER, *Petitioner*,

v.

UNITED STATES OF AMERICA AND HECTOR GRABER, CONSUL GENERAL OF THE GOVERNMENT OF SWITZERLAND, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT THE CONSUL GENERAL OF THE GOVERNMENT OF SWITZERLAND IN OPPOSITION TO THE PETITION

of Counsel:

PETER R. MAIER
ARNOLD & PORTER
1200 New Hampshire
Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

BROOKSLEY E. LANDAU
ARNOLD & PORTER
1200 New Hampshire
Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

Attorney for Respondent The Consul General of Switzerland

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding clearly erroneous the district court's finding that the best efforts promise had not been fulfilled?

2. Whether the court of appeals correctly held that a refusal by the United States to extradite petitioner, resulting in a violation of the Extradition Treaty with Switzerland, was not required in order to comply with the best efforts promise?

3. Whether the court of appeals properly recognized that petitioner's due process rights should not be subordinated to the duty of the United States to fulfill its treaty obligations?

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IN THE

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR RESPONDENT THE CONSUL GENERAL OF THE GOVERNMENT OF SWITZERLAND IN OPPOSITION TO THE PETITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 627 F.2d 745 (5th Cir. 1980).[1] The prior opinions of the court of appeals remanding the case to the district court (Pet. App. 63a-86a, 32a-55a) are reported at 554 F.2d 698 (5th Cir. 1977)[2] and 513

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[1] This opinion will be subsequently referred to as *Geisser III.*

[2] This opinion will be subsequently referred to as *Geisser II.*

F.2d 862 (5th Cir. 1975).[3] An earlier opinion of the district court following the first remand (Pet. App. 56a-62a) is reported at 414 F. Supp. 49 (S.D. Fla. 1976).

STATEMENT OF THE CASE

The Petitioner, Josette Bauer nee Geisser ("Ms. Geisser") is a Swiss citizen who escaped from prison in Switzerland on September 13, 1964. At the time of her escape, she had more than two and one-half years remaining of a sentence for aiding and abetting in the murder of her father for financial gain.

On August 31, 1967, Ms. Geisser was arrested in Miami, Florida attempting to smuggle twenty-eight pounds of heroin into the United States under an assumed identity and using a stolen passport. She was indicted by a grand jury for felony narcotics violations that could have led to sentences of thirty or forty years in prison.

The Government of Switzerland immediately instituted extradition proceedings under the 1900 Treaty of Extradition between the Government of Switzerland and the United States, 31 Stat. 1928 (Pet. App. 94a). After an extradition hearing held in the United States District Court for the Southern District of Florida in which Ms. Geisser and her counsel participated, the district court on November 2, 1967 issued an order certifying Ms. Geisser subject to extradition to Switzerland.

Subsequently, the United States Attorney in Miami, Florida entered a plea bargain with Ms. Geisser under which it was agreed that she would reveal information about the conspiracy to smuggle heroin in which she was

---

[3] This opinion will be subsequently referred to as *Geisser I*.

involved and would testify against others involved in the conspiracy. In turn, the United States Attorney promised that Ms. Geisser would be paroled after three years and that the United States Government would use its "best efforts" to avoid her extradition to Switzerland or France. Thereafter, Ms. Geisser performed her commitments under the plea agreement and was sentenced to seven years' imprisonment.

On October 10, 1969, Ms. Geisser escaped from federal prison, having served just over two years of her seven-year sentence. Her escape occurred prior to the time at which her promised parole was to be granted. Almost three years later on June 25, 1972, Ms. Geisser was apprehended in Albuquerque, New Mexico where she was living under an alias. Ms. Geisser was convicted of escape in federal court and sentenced to a consecutive eighteen-month prison term for that escape.

In August 1973 Ms. Geisser filed a petition for writ of habeas corpus and a section 2255 motion, 28 U.S.C. §2255 (1976), to obtain release from imprisonment and to prevent her extradition. The district court granted Ms. Geisser's petition, ordering her discharged from detention and barring the United States from extraditing her (Pet. App. 28a-31a).

On appeal, the Court of Appeals for the Fifth Circuit in *Geisser I* vacated the district court's decision. It remanded the case for a declaration of position by the United States Government as to what action it intended to take to fulfill its bargain to use its best efforts to avoid Ms. Geisser's extradition (Pet. App. 51a-52a; 513 F.2d at 871-72).

Following the decision in *Geisser I,* the United States Government began to fulfill its promise to use its

best efforts to avoid Ms. Geisser's extradition. The Department of State had a number of communications with the Swiss Government and urged that it would be in the interests of both governments to terminate the case.[4] The Government of Switzerland maintained its request for Ms. Geisser's extradition and intervened in the case.[5]

After a hearing, the district court found that the plea bargain agreement had still not been fulfilled, granted Ms. Geisser her release, and issued an order barring her extradition (Pet. App. 61a; 414 F. Supp. at 52 (1976)).

In its 1977 opinion, the court of appeals in *Geisser II* again vacated and remanded the district court's decision. The court of appeals held that the promise to use best efforts to avoid Ms. Geisser's extradition had not yet been fulfilled and specifically set forth the type of presentation to be made by the United States to the Government of Switzerland in order to fulfill that promise (Pet. App. 74a-75a; 554 F.2d at 703).

After the decision of the court of appeals in *Geisser II*, the United States Government intensified its efforts to persuade the Government of Switzerland to withdraw its extradition request. As the court of appeals recounted in *Geisser III*,

> "a thorough and detailed letter was written by Peter F. Flaherty, Deputy Attorney General, to

[4] These communications between the Department of State and the Government of Switzerland are discussed in the opinion of the court of appeals in *Geisser II* (Pet. App. 68a-73a; 554 F.2d at 701-03).

[5] The text of the position of the Government of Switzerland is set forth in the third opinion of the court of Appeals, *Geisser III* (Pet. App. 19a-20a n.7; 627 F.2d at 754 n.7).

> Secretary of State Vance. The Secretary of State in a diplomatic communication to the Swiss Ambassador requested that the Government of Switzerland withdraw its extradition demand. This letter forwarded the Flaherty letter and adopted its contents. When the Swiss Government again refused to withdraw its request for extradition, two informal meetings were held in the Department of State" (Pet. App. 6a; 627 F.2d at 748).

The presentations by the United States Government to the Government of Switzerland to persuade it to withdraw its demand for Ms. Geisser's extradition covered in detail the four requirements set down by the court in *Geisser II* as necessary to constitute best efforts: (1) the reasons underlying the original bargain, (2) Ms. Geisser's performance in keeping her part of the agreement, (3) Ms. Geisser's intense fear of reprisals, and (4) the conclusion of the United States Government's agents that her fears were well founded (627 F.2d at 750-52).[6] In response to the United States' representations about Ms. Geisser's expressed fears for her safety, the Government of Switzerland made inquiry to the appropriate officials of the cantons that would be responsible for the execution of the remainder of Ms. Geisser's sentence and received strong assurances respecting Ms. Geisser's safety. The Government of Switzerland forwarded those assurances to the United States Government at the same time it informed the United States Government of its renewed request for Ms. Geisser's extradition.[7]

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[6] This portion of the opinion of the court of appeals in *Geisser III* was omitted from the opinion as reprinted in Petitioner's Appendix to her petition for writ of certiorari.

[7] The assurances of Ms. Geisser's safety and the representations of the outstanding record of safety of the prisons where Ms. Geisser would serve out the remainder of her sentence were discussed by the court of appeals in *Geisser III* (Pet. App. 16a-17a; 627 F.2d at 752).

On October 2, 1979, the district court again vacated the extradition order, ordered Ms. Geisser released from any form of detention, and authorized her to continue to reside permanently in the United States. The district court termed the efforts of the United States Government on Ms. Geisser's behalf as "nominal efforts" and declared that Ms. Geisser had been "the only moving force" since the issuance of the court of appeals' opinion in *Geisser II* (Pet. App. 88a).

In considering the appeal of the United States Government and the Government of Switzerland from the district court's October 2, 1979 order, the court of appeals unanimously ruled that the district court's finding that the United States Government had failed to use its best efforts to avoid Ms. Geisser's extradition was clearly erroneous. It found that the United States Government had fulfilled the four requirements that the court had stated in its 1977 opinion as necessary for the performance of the best efforts promise (Pet. App. 13a; 627 F.2d at 750-54). The court of appeals reversed the decision of the district court and reinstated the order for the extradition of Ms. Geisser.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Was Correct In Holding Clearly Erroneous The District Court's Finding That The Best Efforts Promise Had Not Been Fulfilled, And This Court Should Refuse To Review This Issue On Certiorari.

Ms. Geisser asserts that the court of appeals wrongfully set aside as clearly erroneous the district court's finding that the United States Government had not fulfilled its promise to use its best efforts to avoid her extradition. The court of appeals was correct in its unanimous reversal of the district court.

The decision of the court of appeals in *Geisser II* clearly established that under the plea bargain agreement with Ms. Geisser the United States Government had promised only to use its best efforts to avoid her extradition and did not make an absolute promise that she would not be extradited (Pet. App. 74a; 554 F.2d at 703). In *Geisser II,* the court of appeals also set forth what would be necessary to fulfill that promise of best efforts, namely, a presentation by the United States to the Swiss Government of (1) the reasons underlying the original bargain, (2) Ms. Geisser's performance in keeping her part of the agreement, (3) Ms. Geisser's fear of reprisals if extradited, and (4) the conclusion of the United States Government's agents on the case that those fears were well founded (Pet. App. at 74a-75a; 554 F.2d at 703).

The decision of the court below that Ms. Geisser seeks this Court to review, *Geisser III,* carefully evaluated the performance of the United States Government in fulfillment of its best efforts promise against the standard established in *Geisser II* and correctly found that the promise had been fulfilled. The court of appeals' review of the performance by the United States Government in fulfilling its best efforts promise was facilitated by the fact that the record was comprised solely of documentary evidence.

As the court of appeals held:

> "It will be observed that the four requirements stated by this Court in its 1977 opinion were covered in detail. . . . "(Pet. App. 13a; 627 F.2d at 752).
>
> "It is the conclusion of the Court that these efforts undertaken by the United States government since the 1977 decision comply with the promise of the government to exercise its best efforts to avoid

> the extradition of Josette Bauer to Switzerland or France. These efforts precisely meet the requirements set up by this Court in its decisions in 1975 and 1977" (Pet. App. 20a-21a; 627 F.2d at 754).

Thus, the court of appeals was correct in reversing as clearly erroneous the district court's decision that the United States Government's efforts, set forth in detail in the Court's opinion in *Geisser III,* were "nominal" and that the Petitioner had been the "only driving force" since 1977 (Pet. App. 88a).

Because the decision of the court of appeals was a purely factual one and was entirely correct, this Court should not review that decision. Review would be inconsistent with the principle that the Court has frequently reaffirmed that it will not grant certiorari to review allegedly erroneous determinations of fact. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508 (1924). Furthermore, review in this case would be particularly inappropriate since the facts are unique and unlikely to be repeated and since the case involves the settlement of principles important only to the parties involved and not to the public at large. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923). The court of appeals' decision is neither in conflict with any other decision of a court of appeals nor in conflict with applicable decisions of this Court. Thus, review of the decision by writ of certiorari is clearly inappropriate because there are no special and important reasons supporting such review. *See* Sup. Ct. R. 17.

II. The Court Of Appeals Correctly Held That A Refusal By The United States To Extradite Petitioner, Resulting In A Violation Of The Extradition Treaty With Switzerland, Was Not Required In Order To Comply With The Best Efforts Promise, And This Court Should Refuse To Review This Issue On Certiorari.

Ms. Geisser asserts that the court of appeals erred in holding that a refusal by the Executive Branch to extradite her was not necessary in order to comply with the best efforts promise by the United States Government. The court of appeals was correct in rejecting this contention.

On three separate occasions, the court of appeals found that Ms. Geisser's plea bargain required the United States Government to use its best efforts to avoid her extradition and rejected the contention that the plea bargain agreement included an absolute promise that she would not be extradited (Pet. App. 8a; 627 F.2d at 749; Pet. App. 74a; 554 F.2d at 703; Pet. App. 52a; 513 F.2d at 872). In *Geisser II,* the court concluded that the best efforts promise required the United States Government to make a strong presentation to the Government of Switzerland regarding Ms. Geisser's cooperation under the plea bargain agreement and the fears for her safety that she harbored (Pet. App. at 74a; 554 F.2d at 703). In *Geisser III,* the court concluded that that presentation had been made (Pet. App. 20a-21a; 627 F.2d at 754).

If, as Ms. Geisser argues, the "best efforts" promise obligated the Secretary of State not merely to seek to avoid Ms. Geisser's extradition by persuasion, but to prevent her extradition in any event, the promise would have been converted into the absolute promise not to extradite that the court of appeals on three occasions rejected as a factual element in the plea bargain. The best

efforts agreement, by its terms, was obviously not an absolute promise to prevent Ms. Geisser's extradition even if the Government of Switzerland insisted on United States compliance with Swiss rights under the Treaty of Extradition. 31 Stat. 1928 (Pet. App. 94a). The court below correctly determined that this best efforts promise by its nature could not be interpreted to prevent the United States Government from extraditing Ms. Geisser, thereby compelling the United States Government to violate its treaty and international law.

Ms. Geisser argues that the Secretary of State has the discretion not to extradite and should be required in this case to exercise that discretion in her favor. Assuming *arguendo* that the Secretary has limited discretion to refuse to extradite under United States law, a refusal would, of course, result in a violation of the United States' obligations to Switzerland under international law. The best efforts promise here in issue cannot be construed to mandate that result.

This issue, too, is purely factual and was correctly decided by the court below. This Court should not undertake to review it because of the principles set forth above.

III. The Court Of Appeals Properly Did Not Subordinate Petitioner's Due Process Rights To The Duty Of The United States To Fulfill Its Treaty Obligations, And This Court Should Not Review This Issue On Certiorari.

Ms. Geisser argues that the court of appeals erred by subordinating her due process rights to the fulfillment by the United States of its treaty obligations to Switzerland. She invites this Court to review the facts in this case, to reverse the factual findings of the court below, and thereafter to clarify its decision in *Reid* v.

Covert, 354 U.S. 1 (1957), regarding whether constitutional rights are supreme over treaty obligations.

The court below did not, however, subordinate Ms. Geisser's due process rights to United States treaty obligations, but, indeed, held just the opposite. Relying on both *Santobello* v. *New York,* 404 U.S. 257 (1971), and the plurality opinion in *Reid* v. *Covert,* 354 U.S. 1 (1957), the court of appeals specifically stated,

> "[i]f the United States government has not complied with the plea bargain, her [Ms. Geisser's] constitutional claim is a valid one and a purported treaty obligation of the United States government cannot override an individual constitutional right" (Pet. App. 10a; 627 F.2d at 750).

The court below specifically found, however, that because Ms. Geisser's plea bargain agreement had been fulfilled, her due process rights would not be violated by extradition. Thus, it found that no conflict existed between the fulfillment of United States treaty obligations and Ms. Geisser's due process rights (Pet. App. 20a-21a; 627 F.2d at 754).

This Court could reach the issue posed in *Reid* v. *Covert* — whether constitutional rights take precedence over the fulfillment of treaty obligations — only if it reversed the factual determination of the court below that the plea bargain agreement was fulfilled. The Court should decline petitioner's invitation to reexamine *Reid* v. *Covert* and address the question of balancing international treaty rights against constitutional rights in this case since the determination below rested upon a finding on unique facts and since the court below did not hold that constitutional rights were subordinate to the fulfillment of United States treaty obligations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BROOKSLEY E. LANDAU
ARNOLD & PORTER
1200 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Attorney for Respondent The Consul General of the Government of Switzerland

Of Counsel:

PETER R. MAIER
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

No. 80-1316

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSETTE CLAIR BAUER, NEE GEISSER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SIDNEY M. GLAZER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1316

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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the United States was required under its plea bargain to refuse to extradite petitioner.

2. Whether the court of appeals properly reversed the district court's conclusion that the United States had not used its best efforts to avoid petitioner's extradition.

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JURISDICTION

The judgment of the court of appeals was entered on October 10, 1980 (Pet. App. 89a). A petition for rehearing was denied on November 6, 1980 (Pet. App. 91a). The petition for a writ of certiorari was filed on February 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On November 21, 1967, the United States District Court for the Southern District of Florida issued an order certifying that petitioner was subject to extradition to Switzerland to continue serving a sentence for patricide (Pet. App. 105a-106a). In May 1973, petitioner filed in the United States District Court for the Southern District of Florida a petition for a writ of habeas corpus to prevent her extradition. The district court granted relief (Pet. App. 28a-31a), and the court of appeals reversed and remanded (Pet. App. 32a-55a; 513 F. 2d 862). On remand, Switzerland was permitted to intervene, and in May 1976 the district court ruled anew that petitioner could not be extradited (Pet. App. 56a-62a; 414 F. Supp. 49). The court of appeals reversed and remanded the case for a second time (Pet. App. 63a-86a; 554 F. 2d 698). The district court in October 1979 again set aside the extradition order (Pet. App. 87a-88a). On appeal, the court of appeals vacated the decision of the district court and rendered a judgment that petitioner is subject to extradition (Pet. App. 1a-24a; 627 F. 2d 745).

The facts of this case are detailed in the three opinions of the court of appeals (Pet. App. 1a-7a, 63a-73a, 34a-44a). Briefly, in 1964 petitioner escaped from prison in Switzerland, where she had more than two and one-half years remaining of a sentence for aiding and abetting the murder of her father for financial gain. In 1967, she and an accomplice were arrested in Miami, Florida, and indicted for attempting to smuggle heroin into this country. While the United States Attorney was engaging in plea negotiations with petitioner and her companion, subsequent to their indictment, the government of Switzerland obtained an order certifying that petitioner was deportable. Shortly thereafter, the United States Attorney entered a plea agreement with petitioner and her companion under which it was agreed that they would reveal all they knew about the heroin conspiracy and would testify against their co-conspirators. In turn, the United States Attorney promised to reindict them for lesser offenses and to secure their parole after three years; in addition, the officials involved assured petitioner and her co-defendant that "we would do everything possible" to prevent the extradition of the defendants to Switzerland or France (Pet. App. 38a n.5).[1] Thereafter,

---

[1]The testimony about the best-efforts aspect of the agreement included testimony from petitioner's attorney, James Jay Hogan, as follows (2 R. 53-52, 61-62; Pet. App. 111a-112a):

> Now, there was not absolutely a 100 percent deal that she would not be deported to Switzerland, as far as I remember . . . they could not say, "We won't deport her to Switzerland," because they didn't have the power. That was the State Department at that time, but they said, "We'll do everything we can."

One of the government attorneys who participated in the negotiations stated that he had told petitioner, co-defendant Lambert, and attorney Hogan that "we would do everything possible to see that they would be deported to a country other than Switzerland" (Pet. App. 38a n.5) and that, although he had not reviewed the relevant materials from his discussions some five years earlier, he felt that petitioner was "entitled

petitioner cooperated fully and was sentenced to the lesser offenses in accord with the agreement. She escaped from a federal prison in October 1969 and remained at large until June 1972. Because of her escape, the Department of Justice disavowed the plea agreement.

In August 1973, petitioner filed a habeas petition to compel performance of the agreement and prevent her extradition; the district court granted the petition. On appeal, the court of appeals found the record silent concerning any efforts by the Department of Justice to "influence the actions of the independent sister branch[] of the Government—the State Department" in its efforts to procure petitioner's extradition (Pet. App. 45a-46a). The court accordingly remanded for consultations with the State Department and the development of "the position of the United States Government" concerning petitioner's extradition (*id.* at 51a-52a). Further, if that position did not result in petitioner's release, the district court was to hold a hearing to determine what the government had done with respect to its "best efforts" promise in the event that Switzerland insisted on extradition (*ibid.*).

Following remand, Deputy Attorney General Harold Tyler wrote Secretary of State Henry Kissinger reporting the agreement, including a brief request that he assist in resolving the problem.[2] The State Department exchanged notes with the Swiss government,[3] and met with their representatives. The Swiss government nevertheless insisted that

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to believe that the United States Government would make every possible effort to see that they were deported to a country other than Switzerland" (*id.* at 40a n.5).

[2]The text of the exchange of letters between the Department of Justice and Department of State is set forth in the second opinion of the court of appeals (Pet. App. 67a-71a nn. 2, 3).

[3]The text of the notes is contained in the third opinion of the court of appeals (Pet. App. 17a-18a n.6).

a failure to grant extradition would violate the obligation of the extradition treaty and indicated that they continued to assert their rights under the treaty.[4]

After a hearing (in which Switzerland participated as an intervenor), the district court found that these actions by the government were "too little, and too late" to discharge its obligations (Pet. App. 61a). Upon an appeal by both the United States and Switzerland, the court of appeals, finding that the petitioner's fears for her life if she was extradited had been inadequately stressed to the Swiss government (Pet. App. 75a), was "not convinced that the vast powers of persuasion at the command of the Departments of Justice and State have been adequately applied to Bauer's cause" (Pet. App. 81a). Accordingly, the court again remanded the case to give the government "a reasonable time in which to use its 'best efforts' to prevent the extradition" of petitioner (*id.* at 81a-82a).

After this decision, the Secretary of State, in a diplomatic communication to the Swiss ambassador, requested that the government of Switzerland withdraw its extradition demand. That communication forwarded and adopted a detailed letter from the Deputy Attorney General, which, *inter alia,* stressed petitioner's fear for her life and her cooperation in an important narcotics prosecution.[5] When the Swiss government again refused to withdraw its request for extradition, two informal meetings were held in the Department of State. The Swiss ambassador then communicated again with his government in an attempt to get the government to withdraw its extradition request, but these efforts failed.

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[4]The text of the position of the Swiss government is also contained in the third opinion of the court of appeals (Pet. App. 19a-20a n.7).

[5]These letters are set forth in the third opinion of the court of appeals (Pet. App. 12a-15a nn. 4, 5).

Following these efforts, District Judge Mehrtens again vacated the extradition order. He directed that petitioner be released from any form of detention and be authorized to continue to reside permanently in the United States. The Judge characterized the efforts of the United States as "nominal" and "wholly inadequate to fulfill" the government's obligation under the plea bargain (Pet. App. 87a-88a). Shortly thereafter, the Department of State held a meeting with the Swiss ambassador and two of his aides, but was again unable to persuade Switzerland to withdraw its extradition request.[6]

The ensuing appeal of the district court's order by the United States and Switzerland led to the decision ordering petitioner's extradition, from which she now seeks review.

ARGUMENT

1. Petitioner asserts that this Court should grant review in order to establish that individual constitutional rights prevail over treaty obligations. But the court below did not dispute this abstract proposition. It expressly agreed that "a purported treaty obligation of the United States government cannot override an individual constitutional right" (Pet. App. 10a). Petitioner's disagreement with the court below thus turns on the application of that principle to the particular facts of this case. Petitioner bases her assertion of a constitutional right on the terms of her plea agreement as she interprets it—essentially, she claims that the agreement constituted an absolute commitment that she would not be extradited to Switzerland. On that basis, she argues that she has a constitutional right to enforce the plea agreement, which right overrides the Swiss government's treaty right to extradite her. But the court of appeals interpreted the agreement as requiring only that the government use its best

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[6]The memorandum of this meeting is contained in the opinion below (Pet. App. 17a-18a n.6).

efforts to avoid her extradition (Pet. App. 8a-9a). As the court explained, "[b]est efforts can only mean full pursuit of the cause through diplomatic channels in dealing with a friendly nation" (*id.* at 21a). The court carefully reviewed the record and concluded that "the government has requested, has tried to persuade several times, and has humbled itself to the Swiss government in its attempt to get the Swiss government to withdraw its request" (*id.* at 23a). On that basis, the court found that the terms of the plea agreement had been met, so that petitioner has no constitutional right inconsistent with her extradition pursuant to the requirements of the treaty.

Petitioner's fact-bound dispute over the terms of her plea agreement do not merit further review. In any event, the court of appeals' interpretation of the agreement is clearly correct. As the attorney who represented petitioner in the plea negotiations recognized (see note 1, *supra*), the authority of the prosecutors with whom the negotiations were conducted was limited. They had no power to bind the government not to fulfill its treaty obligations to Switzerland. In our view, the most reasonable construction of the prosecutors' promise to "do everything possible" to prevent petitioner's extradition to Switzerland is that the Department of Justice would intervene on petitioner's behalf with the Department of State. The court of appeals required more than this, treating the promise as committing the United States Government in its dealings with Switzerland, and that broader requirement has been satisfied.

Petitioner incorrectly suggests (Pet. 14-15) that the language of the extradition statute, 18 U.S.C. 3186,[7] permits the Secretary of State to decide on humanitarian grounds

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[7]The statute provides in pertinent part that "[t]he Secretary of State may order the person * * * to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged."

not to extradite petitioner despite the insistence of Switzerland that we are bound by the Treaty, which contains no such exception. As the court of appeals recognized in its initial opinion (Pet. App. 52a n.22), the Secretary of State may well have limited discretion not to extradite in appropriate cases. See, *e.g.*, *Sindona* v. *Grant*, 619 F. 2d 167, 176 (2d Cir. 1980); *Wacker* v. *Bisson*, 348 F. 2d 602, 606 (5th Cir. 1965); Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313, 1328 (1962). The power to refuse to extradite on humanitarian grounds, however, "exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice." *Peroff* v. *Hylton*, 542 F. 2d 1247, 1249 (4th Cir. 1976), cert. denied, 429 U.S. 1062 (1977).[8] The extradition of petitioner to complete service of a sentence for the murder of her father is neither persecution nor a grave injustice.

2. Petitioner further argues (Pet. 16-20) that the court of appeals acted improperly when it set aside the findings of the district court that the United States had not used its best efforts to avoid her extradition. She asserts that the district court's findings were factual findings that should not be overturned unless clearly erroneous. Even assuming that is the applicable standard,[9] we submit that the ruling of the district court was properly reversed.

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[8]Peroff, who had entered into a witness protection agreement with the Department of Justice, contended, like petitioner, that his extradition would endanger his safety. The court of appeals responded, "[i]f there are potential assassins in [the foreign country's] prisons, it is for [that country] to take measures adequate to secure Peroff's safety and protection. There is no reason to suppose that [the country] cannot do whatever is required to assure Peroff's safety" (542 F. 2d at 1249). The same is true here.

[9]Although the court of appeals agreed on the second appeal that this was the applicable standard (Pet. App. 78a), we submit that where, as here, there is no dispute concerning what the government has done to comply with the agreement, and the question is solely whether those

The uncontradicted evidence showed that the United States urged the Swiss to consider both petitioner's invaluable service to the world community in giving evidence against a large international narcotics conspiracy, and her fears that her custody in Switzerland would expose her to reprisals for that cooperation.[10] These communications corrected the defects pointed out by the earlier opinions of the court of appeals in the documents previously given to Switzerland: the new representations emphasized petitioner's intense fear of reprisal, stated that government agents considered her fear to be well-founded, and stressed her admirable performance of her part of the agreement. In response, the Swiss government conferred with the local Cantons responsible for carrying out the remaining portions of petitioner's sentence concerning her fears for her safety. Thereafter, appropriate officials of both Cantons gave their assurances that petitioner would be safe in Switzerland, noting that the prison in which she would be held has an outstanding record of safety and that all actions necessary for her safety would be taken. It was clearly erroneous for the district court to characterize the action of the United States as "nominal efforts" (Pet. App. 88a).[11] The court of appeals, therefore, properly set aside the decision of the district court.

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efforts are legally sufficient to meet its obligations, the issue is one of law to which the clearly erroneous standard does not apply. Similarly, there is no merit to petitioner's suggestion (Pet. 19) that it was necessary to take further evidence to determine whether the government's efforts, reflected in the documentary submissions, satisfied the "best efforts" obligation of the agreement.

[10]Petitioner has never suggested any other contention that could reasonably have been advanced in order to persuade the Swiss not to insist upon her extradition.

[11]Petitioner incorrectly asserts that the United States never expressed a sincere and unqualified belief that petitioner should not be extradited (Pet. 18). The letter of the Deputy Attorney General to the Department of State strongly urged that petitioner not be extradited. The State

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SIDNEY M. GLAZER
Attorney

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Department in turn made diplomatic efforts, which the court below properly characterized as "indicat[ing] a measure of humiliation", in its efforts to get the Swiss government to forego extradition (Pet. App. 21a-22a). Indeed, the State Department even persisted with a meeting with Swiss officials after the last adverse ruling of the district judge. In short, the United States sincerely tried to persuade Switzerland to withdraw its deportation request. It was not inconsistent with this endeavor to take the position before the courts that the terms of the agreement with petitioner had been complied with.

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